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No. _____

In The

Supreme Court of the United States

October Term, 1994

UNION SCHOOL DISTRICT, CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents, JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do parents of a disabled pupil have a right to family reimbursement to maintain a second dwelling when the parent has unilaterally placed the pupil in a private day program beyond a reasonable commute distance from the family's residence?

2. Are parents of disabled pupils entitled to reimbursement for unilateral placements when they have ignored the procedural safeguards that were established for their benefit under the Individuals With Disabilities Education Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were:

1. Petitioner Union School District, plaintiff and appellant below.

2. Petitioners California Department of Education, Bill Honig as Superintendent of Public Instruction, defendants and cross-claimants against the Smith-defendants, and appellants below.

3. Respondents B. Smith by and through his parents Donna and John Smith (under seal), defendants, cross-defendants and appellees below.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, California Department of Education, the State Superintendent of Public Instruction, and Union School District respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 1, 1994.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 15 F.3d 1519 (9th Cir. 1994). It is reprinted at pages App. 1-19 of Appendix A to this Petition. The Order Re: Cross Motions For Summary Judgment and Judgment of the District Court are unreported and are reprinted at pages App. 21-42 of Appendix B to this Petition.

STATEMENT OF JURISDICITON

Petitioner, Union School District, initially invoked federal jurisdiction under 20 U.S.C. § 1415 by bringing suit in the United States District Court for the Northern District of California. Judgment was entered against all petitioners on August 28, 1991. On appeal, the Ninth Circuit Court of Appeals entered an opinion affirming the district court's judgment which was filed on February 1, 1994. Petitioners California Department of Education and the Superintendent of Public Instruction, joined by Union

School District, filed a Petition for Rehearing and a Suggestion for a Rehearing En Banc, which was denied on June 9, 1994.

The jurisdiction of this Court, to review the opinion of the Ninth Circuit Court of Appeals, is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and its governing regulations, 34 C.F.R. Part 300, and Part 30 of the California Education Code, commencing with § 56000 are set forth in Appendix C at pages App. 43-54 of this petition.

STATEMENT OF THE CASE

A. Facts.

Petitioners adopt the district court's statement of the facts as found in Appendix B, pages App. 21-27 of this Petition.

B. Summary Of The Arguments.

This case involves the question of whether parents encounter any limits on the unilateral actions that they can take in securing special education and related services for their disabled children under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

With no analysis of the relevant arguments presented by these petitioners, the Ninth Circuit erroneously concluded that because the IDEA at 20 U.S.C. § 1401(a)(17), states that disabled pupils are entitled to "transporation . . . and other supportive services . . . as may be required to assist a child with a disability to benefit from special education", it necessarily follows that:

> if a child's appropriate special education placement is at a *non*-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education. [Emphasis added]

No one disputes that disabled pupils may be entitled to residential school programs and necessary transportation services. But with its cursory analysis of what constitutes a "related service", the Ninth Circuit ignored the difficult issues and these questions of exceptional importance:

1. Are *families* of disabled pupils also entitled to reimbursement for living expenses?

2. Are parents of disabled pupils free to place their children at public expense in *any day* program they desire, regardless of its location and without reference to the procedural safeguards established *for their benefit*, whenever disagreements between the school and the parent arise?

This appeal is not about whether Bernard, the disabled pupil, was offered a free appropriate education

under the IDEA. It is about the limits on Bernard's entitlement under the IDEA. It is about whether his parents, Doctor and Mrs. Smith (the Smiths), were entitled to seek a *day* treatment program in Los Angeles, over 400 miles from their residence in San Jose, and establish a *second dwelling* in Los Angeles *at public expense.*

It is also about parents' responsibilities under the IDEA. The Ninth Circuit's decision effectively excuses the Smiths' disregard for the procedural safeguards which Congress established to assist parents in the timely resolution of disputes.

Ignoring the legislative history, the statute and the case law that would require harsher results for the disabled pupil's parents, the district court and the Ninth Circuit stretched the intent and plain language of the IDEA to conclude that the State and school district are required to reimburse the Smiths for the actual expenses of establishing a second dwelling in Los Angeles: $895 per month plus utilities (at $200 a month or subject to proof), and airfares for Bernard and his mother to and from Los Angeles at the beginning and end of the school year and during school holidays.

Excusing the parents from any responsibilities under the IDEA, the Ninth Circuit has distorted the purpose of the IDEA and transformed it into a damage statute against school districts. Treating "appropriate education" as though educational decision-making is an exact science, the Ninth Circuit has given parents the freedom to ignore the carefully crafted procedures of the IDEA and to unilaterally purchase any program for their child

whenever they disagree with the school district's educational offering. While excusing the parents from any obligation under the IDEA, the Ninth Circuit holds school districts to an unrealistic standard of exact compliance, with no room for even a good faith deviation.

The Ninth Circuit also erred by failing to recognize that the facts and issues of this case are significantly distinguishable from both *Burlington School Committee v. Department of Educ.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

The Court in *Burlington, supra*, 471 U.S. at 369, required that parent placements be "proper under the Act". The Ninth Circuit failed to address whether second dwellings for parents are "proper under the Act", or whether parent-placements that are made without regard to the procedural safeguards are "proper under the Act." Likewise, while the Ninth Circuit summarily concludes that "the language and spirit of the IDEA encompass reimbursement for *reasonable* . . . lodging expenses" [emphasis added], it never directly addressed the issue of whether paying for parents' second dwellings is "reasonable".

This case involves questions of exceptional importance to the school districts within the Ninth Circuit and nationwide. The Ninth Circuit, standing alone among the circuits, has twice ruled that payment for family homes is a legitimate cost to be born by the public schools. *See* the related case of *Ojai Unified School District v. Jackson* (No.

93-2074), also before this Court on a petition for certiorari. It is essential that the following arguments, ignored by the Ninth Circuit and district court, be heard.

REASONS FOR GRANTING THE WRIT

I. WHILE RESIDENTIAL PROGRAMS FOR PUPILS ARE CLEARLY AUTHORIZED, NOWHERE DID CONGRESS CONTEMPLATE THE RELOCATION OF FAMILIES AT PUBLIC EXPENSE.

The courts below failed to make the clear distinction that Congress made between "related services" and "residential placements", thus missing the fact that lodging costs are limited to placements made in residential programs.

A. "Lodging"[1] Costs Are Not Related Services.

Relying on the "related services" provision of the IDEA, 20 U.S.C. § 1401(a)(17), with emphasis on the broad language that related services include "other supportive services . . . as may be required to assist a child with a disability to benefit from special education", the Ninth Circuit concluded that "lodging" costs are reimbursable related service expenses. However, a careful analysis of the IDEA leads to the conclusion that lodging costs are not "related services".

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[1] "Lodging" is the term used by the panel of the Ninth Circuit, a curious euphemism for reimbursing parents for second dwellings.

A fundamental rule of statutory interpretation is that when presented with a listing of legislative items that include but are not limited to those specifically listed, courts will consider the like nature of other items suggested for implicit inclusion. Without such a limitation on the courts' powers of interpretation, the courts would assume the role of legislative bodies, in violation of the Constitutional division of powers.

Here, one need only look at the types of "related services" that Congress specifically included in the IDEA, and that have been carefully defined by the Secretary of Education in the Code of Federal Regulations, to conclude that lodging for children *and* parents was certainly not one of them, to wit: audiology, counseling services, early identification and assessment, medical services for determining the disability, occupational therapy, parent counseling and training, physical therapy, psychological services, recreation services, rehabilitation counseling services, school health services, social work services, speech pathology, and transportation. 34 C.F.R. § 300.16. The Note following this regulation is also instructive: "The list . . . is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy). . . . "

Lodging is not mentioned as a related service, and common sense indicates that it is unlike any other related service explicitly included by Congress. The panel erred in summarily concluding that lodging is a related service.

Turning to the clause that states "as may be required to assist a child with a disability to benefit from special

education" does not save the Ninth Circuit's cursory conclusion that lodging is a related service. Obviously, without food, water, clothing, a roof over one's head, etc., it may be difficult, if not impossible, for a disabled pupil to benefit from his/her special education. However, it should come as no surprise to the Court that education does not pick up every such need as a related service.

There are limits to what Congress included as "required to assist a child . . . to benefit from special education", and Congress has set those limits by listing a series of like items that may be defined as "related services". Second dwellings for parents are not included in that listing. Neither is "lodging".

In fact, Congress gave explicit and *separate* treatment to the issue of paying for lodging.

B. Congress And The Secretary Of Education Specifically Treated Residential Placements As Residential Schools, Not Second Dwellings For Families.

Congress makes only one reference to residential placements in the IDEA and it is in the context of *residential schools,* not second dwellings or lodging for relatives of disabled pupils.

In defining "free appropriate public education", Congress stated that it includes "pre*school,* elementary, or secondary *school* education in the State involved" (20 U.S.C. § 1401 (a)(18)) and Congress defined elementary and secondary *schools* to include *"residential schools"*. (20 U.S.C. §§ 1401 (a)(9) and (10)). In clarifying the scope of a "free appropriate public education" (34 C.F.R. Subpart C),

the Secretary of Education also makes his only reference to residential placement: "If placement in a public or private *residential program* is necessary *to provide* special education and related services to a child . . . *the program,* including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 [emphasis added].

Thus, while residential schools for *pupils* were clearly contemplated by Congress as part of a "free appropriate public education", neither Congress nor the Secretary of Education intended that school districts pay for second dwellings for families so that parents could enroll their disabled children in *day* programs of their choice. They clearly limited the residential option to *residential schools or residential programs.*

The Ninth Circuit's reliance on the Congressional finding that "familes are often forced to find services outside the public school system, often at great distance from their residence and at their own expense" (20 U.S.C. § 1400(b)(6)) is *no* support for its conclusion that Congress intended parents to be able to move freely around the country at the expense of the public educational system. It is simply a recognition by Congress that states participating in the IDEA must now offer appropriate programs locally or place pupils in residential schools at no cost to the parents.

To summarize, petitioners contend that the Smiths are not entitled to reimbursement for "lodging" because second dwellings for parents are nowhere authorized by the IDEA, nor can such be divined from Congressional intent. While Congress clearly recognized that, to provide

an appropriate education to disabled pupils, the public schools may find it necessary to utilize residential school placements, nowhere did Congress express its desire that parents be allowed to move with the pupils at public expense. Granted, keeping parents and children together may be the best possible educational choice, but this Court has previously recognized that the IDEA does not require the "best".

II. THE PROCEDURAL SAFEGUARDS ESTABLISHED BY CONGRESS LIMIT THE PARENTS' RIGHT TO TAKE UNILATERAL ACTION

A. Parents Are Not Free To Ignore The Procedural Safeguards Of the IDEA.

The Ninth Circuit ignored the Smiths' dilatory pursuit of the IDEA procedures.

In *Board of Educ., Etc. v. Rowley,* 458 U.S. 176, 187-190, 191-197, 204-207, 208-209, (1982) this Court recognized the importance that Congress placed on the procedural safeguards of the IDEA. Unfortunately, the Ninth Circuit seems to have viewed this Congressional emphasis as requiring the school district to dot every "i" and cross every "t", while allowing parents to disregard the law.

The legislative history, upon which this Court relied in *Rowley* is instructive (*Id.* at 179-180). Congress was clearly concerned that parents of disabled pupils were being denied access to any meaningful education, without any recourse. [1975] U.S. Code. Cong. & Admin. News, 1425, 1430. Congress stated:

> Parents of handicapped children all too frequently are not able to advocate the rights of their children. . . . It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity . . . S.6 [the IDEA] takes positive steps to ensure that the rights of children and their families are protected.

Id., at 1433.

Thus, Congress established an elaborate set of procedural safeguards including, but not limited to, the right to participate in meetings to develop the pupils's individualized educational program (IEP), the right to administrative hearings when they disagreed with the school district's proposal, the right to present complaints of noncompliance to the state educational agency, and the right to receive a remedy from the state when the district failed to comply. *Id.*, at 1432, 1435-1436, 1438, 1441, 1448, 1449, 1451, 1452.

These procedures were designed to give parents access to the system, not full control, and they were not designed as a one way street. In order to be entitled to the benefits of the law, parents are no more at liberty to ignore the IDEA procedures than are school districts.

Two cases are instructive on this point.

In *Burlington, supra,* this Court stressed the risk the parents take when acting unilaterally:

> This is not to say that § 1415(e)(3) [the "stay-put" provision] has no effect on parents. . . . [W]e think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, do so at their own financial risk.

Burlington School Committee, supra, 471 U.S. at 372-374.

In *Doe by Gonzales v. Maher,* 793 F.2d 1470, (9th Cir. 1986), *aff'd. sub nom Honig v. Doe,* 408 U.S. 305 (1988), the Ninth Circuit recognized that parents have the duty to exercise their administrative rights when they disagree with the school district's proposal:

> [A]lthough formulation of an IEP is ideally to be achieved by consensus . . . sometimes such agreement will not be possible . . . If not, *the agency has the duty to formulate the plan to the best of its ability* . . . but must afford the parents a due process hearing. . . . *Similarly the parents have a right to a due process hearing should they believe that the IEP drafted by the local agency conflicts with consensus reached at the meeting.* Any party aggrieved by the findings and decisions made during such due process hearings may seek judicial review under 20 U.S.C. § 1415(e)(2).

Doe v. Maher, supra, 793 F.2d at 1489-1490 (9th Cir. 1986). [Emphasis added].

This Court also affirmed the Ninth Circuit's holding that the sate, under 20 U.S.C. § 1414(d), has the obligation to act on complaints of non-compliance by providing direct services to individual pupils, a duty that the state petitioners note cannot be fulfilled if parents *fail to inform*

the state of the failure of the school district through established complaint procedures. *Honig v. Doe, supra,* 484 U.S. at 328; *Doe v. Maher, supra,* 793 F.2d at 1491-1492.

Sitting on one's rights was not contemplated by Congress. In the final Senate debate on the legislation, Senator Williams, a champion of the IDEA, stated:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. . . . Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be *commenced* and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

121 Cong. Rec. 37, 416 (1975). [Emphasis added].

All of these procedural safeguards fit neatly into a package designed to provide *swift* resolution to disputes between parents and school districts. They cannot be ignored.

B. The Smiths Acted In Disregard Of These Procedural Safeguards.

In June, while Bernard was in a placement to which they had agreed and while negotiations for the next IEP were under way, the Smiths unilaterally relocated Bernard and Mrs. Smith to an apartment in Los Angeles so that Bernard could attend a day treatment program of the Smiths' choice, *without first requesting a new IEP meeting.*

Three weeks later they demanded payment for the placement. When the district refused, the Smiths took no action to notify the State of the district's failure to recognize their lawful residency (nor did they notify the State of any other alleged violations) but simply continued the unilateral placement.

When the district conducted an IEP meeting in September, the Smiths noted their agreement with the goals, objectives and services and their disagreement with the placement offer, and then simply continued Bernard's placement in their unilateral choice. Requesting a hearing in October (four months after the initial unilateral placement) the Smiths finally pressed their administrative remedies in January, seven months after their initial unilateral action and six months after the district had originally offered the IEP placement with which the Smiths disagreed.

Petitioners contend that had the Smiths bothered to appropriately exercise any one of these procedures upon which Congress and this Court has placed so much importance the results of this case would have been quite different.

As an example, visualize the predicament of proof that the parents pose for a school district when a parent refuses an *untried* district proposal, places the pupil unilaterally, and then presents to the hearing officer glowing, *empirical* evidence as to the progress the pupil made in that actual placement, as against the speculative proof of

appropriate placement the district has to offer.[2] By waiting seven months after the unilateral placement to formally contest the district's placement, the Smith's manipulated the procedural safeguards.[3]

Congress did not say that when districts make inappropriate proposals they are acting unlawfully. Rather, Congress recognized that there would be honest differences of opinion over what is appropriate for a child. Thus Congress set up procedural safeguards to establish an even playing field for the resolution of such disputes. Congress did not intend for courts to allow parents to manipulate the evidence by ignoring the procedures of the IDEA.

Neither the decision in *Burlington* nor *Carter, supra,* protect the Smiths. In those cases, the parents exercised their rights after a dispute arose. Here, by unilaterally placing the pupil *prior* to any disputed offer from the district, the Smiths avoided established dispute resolution procedures and manipulated their rights.

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[2] There is some evidence on the record, contested only by the parents, that Bernard made progress in the district's program in which he participated briefly before the parents moved him. It should be remembered that Bernard was a preschooler and rapid progress in any program could be expected simply as a result of his age.

[3] This is becoming a common tactic of parent advocates since this Court's first decision concerning unilateral placements in *Burlington.*

C. Ignoring The Smith's Disregard For The Law, The Ninth Circuit Penalizes The District For A *De Minimis* Procedural Error.

Stretching for a reason to force the district to pay for the parents' unilateral placement, the Ninth Circuit makes much of the fact that the district, after the parents rejected the formal IEP proposal, made another offer verbally, without conducting an IEP meeting. Petitioners fail to see the relevance of this omission in the overall facts of this case. It is clear that the Smiths were prepared to accept nothing less than their unilateral placement. They had visited the placement verbally offered by the district, but they verbally rejected it. Had the district made the offer in writing in an IEP meeting would the Smiths have acted any differently?

Courts facing the issue of procedural violations have noted that the purpose of the procedural safeguards is to insure the full participation of parents. *See, e.g., Doe v. Alabama State Department of Education, et al.*, 915 F.2d 651, 661-662 (11th Cir. 1990). In denying relief for procedural violations, the Eleventh Circuit, in *Doe v. Alabama*, held:

> Because the notice deficiencies in this case had no impact on the Does' full and effective participation in the IEP process and because the purpose of the procedural requirement was fully realized in this case, we agree with the district court that there has been no violation in this case which warrants relief.

Id. at 662.

The Ninth Circuit has stated:

> Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of

> educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of FAPE.

W.G.; B.G. v. Target Range School District, 960 F.2d 1479, 1484 (9th Cir. 1992) [cites omitted.]

The parents were not prejudiced by the verbal offer of placement made by the district. The Smiths refused the verbal offer and continued to insist on the Los Angeles program. They would have acted no differently if the program had been offered in writing. They only exercised their rights to a hearing when it became clear to them that the district was not going to *voluntarily* fund their unilateral placement.

By catching the district on a procedural error while ignoring the parents' disregard for the law, the Ninth Circuit has turned the IDEA into a damage statute that it was never intended to be.

III. THE COURTS' POWER TO PROVIDE EQUITABLE RELIEF IS NOT LICENSE TO REWRITE THE LAW

The IDEA is not an "all or nothing" statute. Congress did not state that if a school district in good faith makes a proposal that is later found to be inappropriate the parent takes all. Indeed, this Court in *Burlington* and *Carter, supra*, has clearly held that parents' demands must be "proper under the Act", and they must also be "reasonable".

Petitioners argue that unlike the unilateral actions of the parents in *Burlington* and *Carter,* the Smiths' placement was not "proper" *because it was done without regard to the law and the procedural safeguards.* Furthermore, in *Carter, supra,* 126 L.Ed.2d at 294, the Court held that while equitable considerations are appropriate in fashioning relief, "[t]otal reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable" and stated that courts "*must* consider the appropriate and reasonable level of reimbursement that should be required." [Emphasis added] The Ninth Circuit failed to make any such consideration.

Even assuming, *arguendo,* that the district-proposed placement was inappropriate, reimbursement to the parents in this case for their unilateral placement meets none of the standards for equitable relief established by this Court.

First, the unilateral placement was not "proper under the Act" because the IDEA does not authorize placement in distant day programs that require second dwellings for families of the disabled pupil at public expense.

Second, and just as important, the parents' actions were not "proper under the Act" because the parents eschewed the proper exercise of the procedural safeguards established for their benefit.

Third, in granting total relief to the parents for all expenses, including their second dwelling, the Ninth Circuit failed to consider the reasonableness of that remedy.

The state petitioners argued below (conceding no more than that it is impossible to know at this point whether the district's proposal in September would have been appropriate and that the hearing officer, the district court and the panel were correct in concluding that the day program in Los Angeles provided an appropriate program) that a "reasonable" and equitable remedy could have been devised. The parents could have been reimbursed for only the costs of the day program (approximately $40,000) and the transportation. By ordering reimbursement for their "lodging" as well, the Ninth Circuit has sent a message to parents nationwide that the IDEA procedures need not be followed: that it is to the parents' advantage to simply make a unilateral placement, deny the school district access to the pupil, claim empirical evidence as to the appropriateness of the placement, and then turn to the law.

CONCLUSION

Issuing the writ will give this Court the opportunity to re-establish the *limits* that Congress and this Court in *Rowley* recognized when guaranteeing disabled pupils the right to a free appropriate public education.

Issuing the writ will give this Court the opportunity to re-establish some order to the carefully crafted procedures that Congress designed, sending a message to parents that they are no more free to manipulate the system than is the system free to manipulate them.

Because the District Court and Ninth Circuit Court of Appeals ignored these important arguments, petitioners respectfully request that the writ of certiorari be issued.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION SCHOOL DISTRICT, *Plaintiff-Appellant,* v. B. SMITH, defendants 2-7 UNDER SEAL, *Defendants-Appellees.*	No. 91-16546 D.C. No. CV-90-20390-JW OPINION 15 F 3d 1519
UNION SCHOOL DISTRICT, *Plaintiff,* v. B. SMITH, defendants 2-7 UNDER SEAL, *Defendants-Appellees,* and CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, BILL HONIG, *Defendants-Appellants.*	No. 91-16595

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
May 12, 1993 – San Francisco, California

Filed February 1, 1994

Before: Cecil F. Poole, Warren J. Ferguson, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Individual Rights/Disabilities/Government Law

The court of appeals affirmed a district court judgment. The court held that the family of a disabled child was entitled to reimbursement for tuition, transportation and lodging expenses incurred in placing the child in a private counseling facility not within commuting distance of the permanent family residence, after the school district failed to offer the child a free appropriate public education.

Appellant Union School District offered to place a disabled child in an educational program at Carlton School. Dissatisfied with that placement offer, the child's parents, who live in San Jose, placed the child in a private clinic in Los Angeles. The clinic was only certified to provide counseling, not special education.

The parents sought reimbursement of expenses incurred in sending their child to the private counseling facility. The district court granted summary judgment to the parents. The reimbursement included the child's transportation costs to and from the clinic each day, transportation costs of commuting between San Jose and

Los Angeles, and the parents' costs for lodging in Los Angeles.

The District appealed, contending that 1) the school district in which the child lived during the school week was the district responsible for his special education, 2) the District's program for autistic children, McKinnon, was an appropriate placement for the child, and the District did not offer it as a placement because the child's parents expressed unwillingness to accept it, and 3) the clinic was not an appropriate placement because it was not certified to provide special education, and counseling is only a "related service" under the Individuals with Disabilities Education Act (IDEA). Appellant California Department of Education also appealed, contending that the district court did not have the power to award the family reimbursement to maintain a second lodging so that the child could live within daily commuting distance of the clinic.

[1] The IDEA assures all handicapped children a free appropriate public education. [2] If a school district fails to offer such an education, parents may place an eligible child in an appropriate private program, with an equitable right to reimbursement for the costs.

[3] A school district has a responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district. [4] Under the ordinary measure of residency, the child's parents continued to reside within the District while the child attended the Los Angeles clinic.

[5] The child's placement at Carlton was inappropriate because it was insufficiently individually

designed to meet his special needs. [6] Moreover, the District never formally offered a placement at McKinnon. [7] The IDEA requires written prior notice to parents when an educational agency proposes an educational placement for a disabled child. The school district could not escape its obligation to make the formal offer by arguing that the child's parents expressed unwillingness to accept the McKinnon placement.

[8] California laws supplement the IDEA on matters of "related services," which California terms "Designated Instruction and Services" (DIS), and provide more stringent protection. Under California law, handicapped three- to five-year-old students may, when appropriate, be placed in a program that only provides DIS without simultaneous special education. Thus, the child's placement in the clinic was appropriate under California law, and therefore under the IDEA.

[9] Thus, the parents were entitled to reimbursement for tuition at the clinic because the District failed to offer them an appropriate placement and their placement of the child at the clinic was appropriate. [10] In addition, reimbursement for lodging and transportation was appropriate. [11] If a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are "related services" under the IDEA that are required to assist that child to benefit from the special education.

COUNSEL

Keith L. Slenkovich, Saratoga, California, for plaintiff-appellant Union School District.

Joyce O. Eckrem, Deputy General Counsel, California Department of Education, for State defendants-appellants.

Kathryn E. Dobel, Berkely, California, for the defendants-appellees.

OPINION

FERGUSON, Circuit Judge:

This case concerns the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, which guarantees handicapped children a free appropriate public education. Union School District ("District") appeals the district court's entry of summary judgment awarding reimbursement of expenses to a family who placed their handicapped child, Bernard Smith, in a private counseling facility after the District failed to offer Bernard a free appropriate public education. The California Department of Education ("CDE") also appeals, on narrower grounds, disputing the power of the district court to award a family reimbursement to maintain a second lodging so that Bernard could live within daily commuting distance of a non-residential education program.

I.

A.

The District argues that the district court's entry of summary judgment for the Smiths was improper. In the

District Court, the parties filed cross motions for summary judgment, anticipating that the court would base its decision on a review of the exhaustive administrative record. No party indicated that it wished to introduce further evidence. *See* 20 U.S.C. § 1415(e)(2) ("the court- . . . shall hear additional evidence *at the request of a party*") (emphasis added).

Notwithstanding this procedural posture, the District argues that there are disputed issues of material fact that render summary judgment improper. Specifically, the District points to the following factual disputes: 1) whether the District's convening of an Individualized Education Program ("IEP") meeting in September 1989 served as an acknowledgment that it was responsible for Bernard's education in the fall of 1989, and 2) whether the District's failure to make a formal offer of a placement for Bernard at the McKinnon school means that McKinnon cannot be considered in deciding whether the District offered a free appropriate public education.

These questions concern the legal significance of undisputed facts. When a mixed question of fact and law involves undisputed underlying facts, summary judgment may be appropriate. *See* W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 475-80 (1983).

There are no disputed underlying facts. The District does not argue that the September IEP meetings did not occur, nor does it argue that it formally offered the McKinnon school as a placement for Bernard. We agree with the District that the district court erred in finding that the District admitted responsibility for Bernard's

education by conducting an IEP meeting in September of 1989. We affirm the district court's legal conclusion, however, that Bernard's residence was within the District on other grounds. We also affirm the district court's legal conclusion that the District cannot be considered to have offered McKinnon as a placement for Bernard.

The only other issue that the District even implicitly raised as a purported factual dispute involved the Smiths' withholding from the District of portions of a report issued by Dr. Bryna Siegel. The Smiths admit to withholding portions of the report that may have been relevant to the appropriateness of a placement at Carlton. This withholding is of no consequence, however, because the District formally offered Bernard a placement at Carlton. It is undisputed that the Smiths showed the District the pages in which Dr. Siegel diagnosed autism. The District points to nothing in the withheld portions of the report that might have influenced its decision formally to offer Bernard a placement at McKinnon. The District was aware that Bernard was diagnosed with autism. Its decision not to offer McKinnon formally as a placement was based on its beliefs that Bernard resided outside the District, and that the Smiths would not accept a placement there.

Furthermore, the District was legally obligated to procure its own report from a specialist such as Dr. Siegel. The District must make "a full and individual evaluation of the child's educational needs," 34 C.F.R. § 300.531, and must "ensure . . . [that the] evaluation [of the student] is made by a multidisciplinary team . . . including at least one teacher or other specialist with knowledge in the area of suspected disability" (i.e., a specialist

in autism). 34 C.F.R. § 300.532(e). Any failure of the Smiths to turn over portions of a specialist's report cannot excuse the District's failure to procure the same information for itself. *See W.G. v. Board of Trustees,* 960 F.2d 1479, 1484-85 (9th Cir. 1992) (parents' failure to secure participation of the child's school at an IEP meeting, even though promised by the parents, does not excuse the school district's obligation under the IDEA to secure such participation).

Because we find no factual dispute precluding summary judgment, we proceed to resolve this case on its legal merits.

B.

We review de novo the appropriateness of an education program. *Gregory K. v. Longview School Dist.,* 811 F.2d 1307, 1310 (9th Cir. 1987). We, like the district court, however, "must give 'due weight' to judgments of education policy when [we] review state hearings. . . . [C]ourts should not substitute their own notions of sound educational policy for those of the school authorities which they review." *Longview,* 811 F.2d at 1311 (internal quotation and citations omitted). The extent of deference to be given is within our discretion. *Id.*

We give deference to the administrative findings of the Hearing Officer particularly when, as here, they are thorough and careful. *See, e.g., Longview,* 811 F.2d at 1310-11; *W.G.,* 960 F.2d at 1483; *accord Hendrick Hudson Cent. Sch. Dist. Bd. of Ed. v. Rowley,* 458 U.S. 176, 206 (1982). We also accord deference to the policy decisions of a school district when it is acting within the bounds of

federal and state law. *See Wilson v. Marana Unified School Dist.*, 735 F.2d 1178, 1183-84 (9th Cir. 1984); *accord Rowley*, 458 U.S. at 207-08.

II.

[1] IDEA, 20 U.S.C. 1400 *et seq.*, assures all handicapped children a free appropriate public education. *See* 20 U.S.C. §§ 1400(c), 1412(1). Judicial review of state Hearing Officers' decisions under IDEA involves two steps. First, the court must determine whether the rigorous procedural requirements of IDEA have been met. Second, the court must determine whether the state has met the substantive component of IDEA – the requirement that the state provide an "appropriate" education. *Rowley*, 458 U.S. at 206-07.

"An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child. . . . The states are obliged to provide 'a basic floor of opportunity' through a program 'individually designed to provide educational benefit to the handicapped child.' " *Longview*, 811 F.2d at 1314, quoting *Rowley*, 458 U.S. at 201.

[2] If a parent believes that a school district has failed to offer a free appropriate public education, parents may place an eligible child in an appropriate private program. "Parents have an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education]." *W.G.*, 960 F.2d at 1485 (citing *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 369 (1985)).

State standards that impose a greater duty to educate handicapped children, if they are not inconsistent with federal standards, are enforceable in federal court under IDEA. *See W.G.*, 960 F.2d at 1483; *see also* 20 U.S.C. §§ 1401(a)(18), 1412(6); 34 C.F.R. § 300.4.

III.

[3] The District argues at great length that the school district in which the child lives during the school week is the district responsible for the child's special education. The District argues that, because Bernard resided in Los Angeles during the school week while attending the Clinic, the District was not responsible for reimbursing the Smiths for the costs of Bernard's education at the Clinic. To support this contention, the District points to various provisions of the California Education Code addressing a school district's responsibility to disabled children who reside within the district. We find that those provisions in no way excuse a school district's responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district. *See, e.g., Taylor v. Honig*, 910 F.2d 627 (9th Cir. 1990) (requiring a school district to pay for a disabled child's placement in a residential program outside the district).

As the Hearing Officer and the district court found, the Smiths maintained their permanent resident in San Jose where they paid taxes and where Bernard's father continued his medical practice. They temporarily maintained a second residence in Los Angeles for the sole purpose of being able to commute daily to an appropriate

non-residential educational program for Bernard. We find no basis for holding that the determination of residency under IDEA or the California Education Code should be different from the ordinary determination of residency.[1]

[4] Under the ordinary measure of residency, we have no difficulty in affirming the district court's holding that the Smiths continued to reside within the District while Bernard attended the Clinic. *See* 27 Cal.Jur.3d (Rev.) Part 2, Domicile § 1-5.

IV.

The Hearing Officer and district court found reimbursement to the Smiths appropriate only after September 12, the date the Clinic became state certified to provide counseling. The Smiths do not contest the denial of reimbursement before this date. Therefore, the only time period in which we must determine the appropriateness of educational programs offered by the District is for the period after September 12 in the 1989-90 school year.

A.

During this period, the District's sole explicit offer (as set forth in its November 1 letter) was an educational program implementing Bernard's IEP through seventeen and

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[1] Our conclusion is buttressed by the declaration of Patrick Campbell, Director of Special Education for the California Department of Education, who stated that residency for special education coverage purposes is measured by the normal standards.

one-half hours a week in the Communicatively Handicapped Class at Carlton School, supplemented by some one-to-one behavior modification counseling.

The Hearing Officer found that this program was inappropriate. The Hearing Officer found that there were no other autistic children at Carlton and there was no evidence that the teacher had been trained to work with autistic children. Furthermore, the Hearing Officer heeded the testimony of the witnesses who had extensive experience with autistic children, who testified that the learning environment at Carlton was inappropriate for Bernard's individual needs:

> Bernard requires a more restrictive and less stimulating environment than that offered at Carlton. He requires full-time, one-to-one instruction and is unable to benefit from group instruction. . . . [A]ll of the witnesses recognized the need for Bernard to acquire attending skills prior to being able to benefit from language instruction. He has not yet attained these requisite skills. . . . Bernard had not . . . developed the requisite skills to benefit from placement in the class at Carlton.

[5] The substantive requirement of the IDEA is that a program be " 'individually designed to provide educational benefit to the handicapped child.' " *Longview,* 811 F.2d at 1314, quoting *Rowley,* 458 U.S. at 201. In light of the deference we grant the Hearing Officer as to judgments of educational policy, we find that Bernard's placement at Carlton was inappropriate because it was insufficiently individually designed to meet Bernard's special needs.

B.

[6] The District contends that McKinnon, the District's program for autistic children, was an appropriate placement Bernard. As the district court found, and the District concedes, the District never formally offered Bernard a placement at McKinnon. The District argues that it did not offer McKinnon because the Smiths expressed their unwillingness to consider it as a placement. Thus, the question we face is whether the District was required to make a formal offer under the IDEA.

[7] We find that a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement. The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. *See* 20 U.S.C. § 1415(b)(1)(C). The Supreme Court has explained the great importance of such procedural components of the IDEA. "When the elaborate and highly specific procedural safeguards embodied in § 1415 [of the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." *Rowley,* 458 U.S. at 205.

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear

record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the . . . educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). For example, in this case, a formal offer of McKinnon would have served several purposes. It would have alerted the Smiths to the need to consider seriously whether McKinnon was an appropriate placement under the IDEA. The Smiths could not have been reimbursed for their unilateral placement of Bernard at the Clinic if McKinnon were an appropriate placement. Also, if a formal offer were made, the Smiths could have decided whether to oppose McKinnon or to accept it with the supplement of additional education services. Finally, by making a formal offer, the District would have been more prepared to introduce sufficient relevant evidence to the Hearing Officer of the appropriateness of McKinnon as a placement for Bernard.[2]

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[2] The Hearing Officer was unable to make a determination of the appropriateness of placing Bernard at McKinnon because the District failed to set forth sufficient evidence concerning McKinnon. Given that the Hearing Officer, an expert on educational policy and practice, was unable to make an informed decision on the appropriateness of McKinnon based on the evidence before her, we are quite hesitant to do so on that same record.

V.

The Smiths, dissatisfied with the District's placement offering, unilaterally placed Bernard in the Clinic. In order for the District to be responsible for reimbursing the Smiths for their expenses in placing Bernard in the Clinic, the Clinic must provide an "appropriate alternative educational program." *W.G.*, 960 F.2d at 1486.

As a preliminary matter, there is little room to dispute that Bernard's instruction at the Clinic was "individually designed to provide educational benefit to the handicapped child," as required by *Longview.* 811 F.2d at 1314. Bernard's counseling was individually designed because it implemented the specific program that Siegel and other autism experts thought most beneficial for Bernard. The educational benefit Bernard received from the Clinic was demonstrated by his significant progress in language skills, and increased cooperation and interaction with peers.

The District argues, however, that the Clinic cannot be an appropriate placement for Bernard because it was not certified to provide special education. The Supreme Court has rejected this position. It held that when a parent places a child in a private setting, reimbursement may be ordered even though the private institution does not satisfy the state education standards. *Florence County Sch. Dist. Four v. Carter,* 114 S.Ct. 361, 365 (1993). Nevertheless, the Smiths have not appealed the denial of reimbursement for the period before the clinic became certified to provide counseling.

We must review, however, the district court's finding that the Clinic became an appropriate placement after

September 12 when it became certified to provide counseling, a "related service" to special education under IDEA. *See* 20 U.S.C. § 1401(17) (listing counseling as a related service). The District argues that federal regulations construing IDEA mandate that it is inappropriate to place a child solely in a related service when not in conjunction with special education itself. *See* 34 C.F.R. § 300.13; 34 C.F.R. § 300.14.

As explained above, the Supreme Court recently held that the appropriateness of a placement does not depend on whether the institution satisfies the state education standards. *Carter,* 114 S.Ct. at 365. In this case, however, this issue is best addressed under state law. "[S]tate procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA] and [are] thus enforceable." *Antkowiak v. Ambach,* 838 F.2d 635, 641 (2d Cir.), *cert. denied,* 488 U.S. 850 (1988).

[8] California laws supplement IDEA on matters of related services, which California terms "Designated Instruction and Services" ("DIS"), and provide more stringent protection. *See* Cal. Educ. Code §§ 56026, 56361, 56441.11(b) (West Supp. 1993). These statutory provisions, when read in conjunction, mandate that under California law, handicapped three to five year old students may, when appropriate, be placed in a program that only provides DIS without simultaneous special education. This is also supported by the Declaration of Patrick Campbell, Director of Special Education for the California Department of Education, who stated that the CDE has always interpreted these statutes in this manner. Because this state law scheme is not inconsistent with IDEA, we will enforce it. Bernard's placement in the Clinic, which was

only certified to provide the DIS of counseling and not special education itself, was appropriate under California law, and therefore under IDEA.

VI.

A.

[9] The Supreme Court has held that a court may order a school district to reimburse parents who have unilaterally placed their child in an appropriate private special education after the school district has failed to offer an appropriate public education. *Burlington School Committee v. Department of Education*, 471 U.S. 359, 369 (1985). The Smiths are entitled to reimbursement for tuition at the Clinic because the District failed to offer them an appropriate placement and the Smith's placement of Bernard at the Clinic was appropriate.

B.

The Hearing Officer and the district court also found that the Smiths were entitled to reimbursement for transportation costs to and from the Clinic each day, the transportation costs of commuting between San Jose and Los Angeles at the beginning and end of Bernard's participation in the program and when the school is officially closed to students (i.e. Thanksgiving, winter and spring breaks), and to reimbursement for the cost of lodging for Bernard and Mrs. Smith in Los Angeles.

[10] The District and the CDE contend that the district court was without power to award the Smiths reimbursement for lodging and transportation. We find that this reimbursement was appropriate.

[11] Under the IDEA, a "free appropriate public education" includes not only special education, but also "related services." Related services include "transportaiton . . . and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(a)(17). If a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education.

The legislative intent underlying the IDEA supports this finding. The IDEA explicitly states: "Congress finds that . . . because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense." 20 U.S.C. § 1400(b)(6). "It is the sole purpose of [the IDEA] to assure that *all* children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c) (emphasis added). Therefore, we find that the language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses in this case as related services.

Our holding is consistent with this court's recent decision in *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993). In *Jackson* the court ordered Ojai Unified

School District to pay tuition, room, board, transportation and caretaking fees for a developmentally disabled student to attend the Foundation for the Junior Blind in Los Angeles. The court found that the public school system was not providing the student with a minimum level of educational benefit and that the Foundation, located approximately eighty-five miles from the child's home, was an appropriate educational placement. The Foundation's residential program was full and, in light of the child's fragile health, the court found that a daily commute was not feasible. Therefore, the court ordered the school district to pay the student's costs of living with his grandparents, approximately twenty miles from the Foundation and, thus, temporarily extended the reach of the Foundation's residential program.

VII.

The Smiths' request for attorneys fees incurred in defending the District's appeal is granted. The case is remanded to the district court for determination of the amount of the appellate fee award. *See Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 590 (9th Cir. 1992).

For the foregoing reasons, we affirm the district court's entry of summary judgment for the Smiths and remand for a determination of the amount of the appellate fee award.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION SCHOOL DISTRICT, Plaintiff-Appellant, v. B. SMITH, defendants 2-7 UNDER SEAL, Defendant-Appellee, v. CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION, BILL HONIG, Defendant-Appellant.	No. 91-16546 D.C. No. CV-90-20390-JW ORDER (Filed June 9, 1994)

Before: POOLE, FERGUSON, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing.

Judges Poole and Fernandez have voted to deny the suggestion for rehearing en banc, and Judge Ferguson so recommends.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNION SCHOOL DISTRICT, Plaintiff, v. BERNARD SMITH, *et al.*, Defendants.	CASE NO. C 90 20390 JW ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Aug. 28, 1991)

This case arises under the Individuals With Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. § 1400 *et seq.* Defendants Dr. and Mrs. Smith are parents of an autistic child who is eligible for free and appropriate special education services under the IDEA. The Smiths were petitioners in a state administrative proceeding before the California Special Education Hearing Unit.

The Smiths prevailed in the administrative hearing and plaintiff Union School District appeals that decision to this Court in the instant action.

BACKGROUND FACTS

Bernard Smith is a five-year-old child who lives with his parents in the Union School District (District). When Bernard was two years old his parents became concerned about his failure to develop speech and language skills, his inappropriate behavior and his delayed social development (Transcript of Record 3-144) ("TR"). In February

1989, the Smiths contacted the local school district for psychometric, speech, and behavioral evaluations of Bernard (TR 3-145).

Barbara Milligan, the District's school psychologist evaluated Bernard during the Spring of 1989. She had difficulty assessing Bernard because he was uncooperative during administration of the diagnostic tests (TR 2-6). She was able to determine, however, that Bernard had deficits in the areas of self-help, social behavior, and communication skills. (Milligan Report, April 4, 1989). Ms. Milligan was reluctant to diagnose Bernard as autistic or retarded because he was under the age of three and because she experienced difficulty testing him (TR 2-13). It was her experience that assessing children like Bernard through participation in a program was often more successful than attempting an assessment through short sessions with a child psychologist. Therefore, Ms. Milligan felt she should take immediate steps to find a diagnostic placement for Bernard in order to further the assessment process (TR 2-8, 2-9).

The District's language specialist Joan Bowen and program specialist Joe Pacheco also had difficulty assessing Bernard. They were unable to administer standardized testing instruments and procedures. They therefore observed Bernard's play, and considered information Bernard's parents provided them. Based on this information, the specialists concluded that Bernard's language was at the one-year level and that Bernard was "not interacting communicatively with his environment to the extent necessary for normal speech and language development." (Bowen and Pacheco Report, March 31, 1989).

At the first Individual Education Program (IEP) team meeting convened on April 3, 1989, Bernard was found eligible for special education on the basis of language and attending deficits. The IEP team, consisting of Bernard's mother, Mrs. Smith, school psychologist Barbara Milligan and program specialist Cathi Serpa, developed goals for Bernard in the areas of self-help, attending, and communication. The team recommended placement in an early childhood special education program three days per week. The team also found him eligible for the extended school year and recommended speech language consultation and services as appropriate. The Smiths consented to the IEP goals and objectives. With respect to finding a placement for Bernard, Cathi Serpa set up an appointment for Mrs. Smith to visit early education classes at the Coventry School (TR 4-198).[1] Serpa testified that Mrs. Smith felt that Bernard was cognitively ahead of the children in these classes and therefore rejected them (TR 4-199 to 4-201). Mrs. Smith testified, however, that the Coventry officials felt the early education classes were not appropriate for Bernard (TR 3-168).

Mrs. Smith also testified that the Coventry School nurse and psychologist believed Bernard was autistic or autistic-like. They therefore recommended that she visit the preschool autistic program at the Mckinnon School before a decision was made about placing Bernard in an early education program (TR 3-163, 3-165). Feeling a

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[1] As a Program Specialist, Serpa was familiar with all the possible educational options in a county and facilitates placement of infants and other children needing special education services (TR 4-178).

sense of urgency, Mrs. Smith then made her own arrangements to visit Mckinnon (TR 3-163). She testified that at the Mckinnon preschool class she saw a lot of mute children, and that she saw children doing stereotypic movements, constant jumping, and hand flapping (TR 3-166). Mrs. Smith felt that her son was not like these children (TR 3-163). Cathi Serpa, who had co-written the April IEP, did not recommend nor propose the Mckinnon School for Bernard's initial diagnostic placement (TR 4-198 to 4-202).

Eventually, the District placed Bernard in a preschool class for the visually impaired at Coventry School. Because Bernard was under an infant IEP, he attended school three days per week for three hours daily (TR 3-168, 4-202).

In addition to the school district's evaluations, the Smiths sought the medical opinion of two experts. Bryna Siegel, Ph.D., and Glen R. Elliott, Ph.D., M.D., of the Pervasive Development Disorder Clinic, University of California, San Francisco, evaluated Bernard on April 26, 1989. Using DSM III-R criteria, they concluded that Bernard exhibited eleven of sixteen criteria for the diagnosis of an autistic disorder. Their report states that their testing also showed moderate mental retardation. Seigel and Elliot also noted Bernard's hyperarousability, resistance to change, and degree of connectedness with his parents, and concluded that he is "likely to be relatively high functioning when older (Siegel and Elliott Report, May 12, 1989)." Siegel and Elliott recommended an educational environment that provided extensive one-to-one instruction with focus on language pragmatics. Drs. Siegel and Elliott indicated that Bernard may be a good

candidate for the Clinic for Behavioral Treatment of Children in Los Angeles (Clinic) "which uses behavioral techniques to help overcome some of the negativistic and disconnected behaviors of autistic children (Siegel and Elliott Report, May 12, 1989)."

On June 1, 1989, the Smiths took Bernard to the Los Angeles Clinic for the purpose of determining whether Bernard would be an appropriate candidate for the Clinic's program. The Clinic staff assessed Bernard and interviewed the Smiths.

The District held a second IEP meeting on June 6, 1989. The IEP team incorporated the goals developed on April 3, 1989, into the new IEP and noted that Bernard had made some progress towards those goals. The team recommended "small group instruction with Special Day Class (SDC) with teacher specialist; small group instruction with speech pathologist or consultation as appropriate for 60 minutes per week; and extended school year for four weeks." The Smiths consented to the IEP goals and objectives but requested a 40 hour a week, one-on-one, intensive behavior modification program, socialization activities, and speech and language services (TR 3-183).

In late June of 1989 Bernard was accepted at the Clinic in Los Angeles for a three month trial period. The Smiths felt that the Clinic was an appropriate placement for Bernard. Therefore, on June 26, 1989 Bernard began the program. Mrs. Smith rented an apartment in Thousand Oaks in which she, Bernard, and his infant sister stayed during the week while Bernard participated in the Clinic program and Mrs. Smith received parent training.

In July 1989, Dr. Smith wrote a letter to the school district asking to meet to discuss Bernard's treatment at the Clinic and requesting payment for Bernard's treatment at the Clinic. Lyle Chambers, District Director of Special Services, responded to Dr. Smith's requests and stated that after consulting with the State Department of Education, he concluded that the District could not implement the IEP developed for Bernard because he was not a resident of the District and because the Clinic was not certified to provide special education. By letter dated August 15, 1989, Dr. Smith then requested an immediate IEP meeting and asserted that the District violated Bernard's rights to identification and assessment of his handicapping condition, as well as development and implementation of the IEP.

On September 21, 1989, the District held a third IEP meeting. The team decided that Bernard needed to be assessed in speech and language areas. Joan Bowen, the District's Speech and Language Specialist, evaluated Bernard and found that Bernard had made remarkable improvement in the area of language. She also noted social growth and indicated that Bernard was cooperative and responsive during testing.

The IEP reconvened on September 29, 1989. Bernard's basis for Special Education eligibility was changed to "delays," with a sub-classification of autistic. Goals and objectives addressing socialization, preacademic skills, self-help, receptive and expressive language were developed. The team recommended placement in a highly structured preschool Special Day Class and a behavioral intervention program for Bernard, which included parent

consultation. The Smiths agreed with the goals and objectives developed at that meeting, but withheld their consent to the IEP based on their objections to the description of the proposed educational program for Bernard.

By letter dated November 1, 1989, the District offered to place Bernard at Carlton Elementary School in a Communicatively Handicapped (CH) Special Day Class upon Bernard's return to the District. He also indicated that a behavior management consultant, would be available to work with Bernard's teacher and the Smiths.

The Smiths did not feel the proposed placement at Carlton was appropriate. The Smiths requested a due process hearing on October 13, 1989, regarding the issue of the appropriate educational placement for Bernard. They asserted claims for travel, living, and treatment costs for Bernard, his mother, and his infant sister while living and receiving treatment in Los Angeles.

On June 18, 1990, the hearing officer found, *inter alia*, that 1) the Union School District did not offer an appropriate educational placement for Bernard; 2) the Clinic in Los Angeles was an appropriate placement for Bernard for the 1989-1990 school year, 3) commencing with September 12, 1989, the date the Clinic was certified, the District was required to pay for the travel, living, and treatment expenses of the Smith's in Los Angeles, and 4) the District is responsible for the costs of the assessment made by Drs. Siegel and Elliott.

The District has appealed the hearing officer's decision to this Court.

LEGAL OVERVIEW

In 1975, Congress enacted the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq*. This act was recently renamed the "Individuals With Disabilities Education Act" (IDEA). One purpose of the IDEA is to assure that all disabled children have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Under the IDEA, states receive federal monies to provide special education services. The IDEA and its implementing regulations, 34 C.F.R. §§ 300.1 *et seq*., set forth procedural and substantive standards for educating handicapped pupils. The IDEA also incorporates the states' substantive and procedural standards concerning the education of handicapped pupils. 20 U.S.C. §§ 1401(a)(18) and 1412 (6); 34 C.F.R. § 300.4; *see also, Gregory K. v. Longview School District*, 811 F.2d 1307, 1309 (9th Cir. 1987).

1. Jurisdiction and Standard of Review

This Court has jurisdiction to review the decision of the California Special Education Hearing Office pursuant to 20 U.S.C. § 1415(e)(2). That section provides in pertinent part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate.

Further, under section 1415, federal courts have the authority to enforce both the federal requirements under the IDEA and "relevant" state law regarding the education of handicapped pupils. " 'Relevant' state law is law that is not inconsistent with the federally mandated requirements." *Town of Burlington v. Department of Education Commonwealth of Mass*, 736 F.2d 773, 780 (1st Cir. 1984). State law, however, may provide greater protections than the federal requirements. *Id.*

Concerning the proper weight to be given the state administrative findings, the First Circuit articulated the following standard:

> Because Congress intended courts to make bounded, independent decisions – bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court – the question of the weight due the administrative findings of facts must be left to the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

736 F.2d at 791. This Court will use the *Burlington* standard as a guide in its independent review of the administrative record.

2. Summary Judgment

Summary judgment is appropriate if the records and files show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The ultimate issue in an EHA placement case is whether the public school district can provide a "free appropriate public education" to eligible individuals. This issue raises a mixed question of law and fact. *Gregory K.* [sic] *Longview School District,* 811 F.2d 1307, 1309 (9th Cir. 1987). Courts have often been hesitant to grant summary judgment on mixed questions of law and fact "when the record has not been sufficiently developed to allow a fully informed decision on an outcome determinative issue." *Bertolucci v. San Carlos Elementary School District,* 721 F. Supp. 1150, 1153 (N.D. Cal. 1989), *citing* W. Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 475 (1983). In cases brought under the IDEA, however, the district court has an extensive administrative record before it. For example, the court in this case has a 1415 page transcript, 68 exhibits and a 45 page hearing decision to review. Thus, because the instant record is fully developed the concern regarding the appropriateness of summary judgment is not present.

The Court's role in this case is to review independently the evidence introduced at the administrative hearing. The Court finds that there are no historical facts in dispute that relate to the issue of the appropriate program for Bernard and that the differences between the experts can be resolved without an assessment of witness credibility or demeanor. Therefore, a trial is unnecessary

and summary judgment is appropriate in this case. *Bertolucci,* 721 F. Supp. at 1153.

ANALYSIS

Bernard's Residency

The District contends that because Bernard lived in Los Angeles during the weekday while he attended the Clinic he resided in Los Angeles during the 1989-1990 school year. Therefore, the District asserts that the Los Angeles Unified School District was responsible for his education during that period. The Smiths, on the other hand, contend that Bernard resided and still resides within the District because the Smiths' permanent residence is in San Jose.

Here, the hearing officer found and the record shows that the Smiths' residency did not change even though Mrs. Smith, Bernard, and his sister temporarily lived in Los Angeles in order for Bernard to attend the Clinic. The evidence establishes that the Smiths reside within the jurisdictional boundaries of the Union School District. The Smiths' have declared that San Jose is their permanent residence. They own and live in a house there. Dr. Smith has a medical practice nearby. The Smiths vote and pay taxes in San Jose. The Smiths have neither divorced nor separated. Mrs. Smith, Bernard and his sister temporarily stayed in Los Angeles during the school week in 1989-1990 solely for the purpose of Bernard's attending the Clinic. Further, Bernard, has sister and mother returned to San Jose on weekends and holidays.

The hearing officer found that "the fact that the Smiths' disagreed with the placement proposed by the District does not dictate that their residency has changed for purposes of assigning responsibility for Bernard's education (Hearing Officer Decision p. 24)." The Court finds this reasoning persuasive in light of the Smiths' clear intention not to remain permanently in Los Angeles.

Moreover, although the District strongly contends that it was relieved of responsibility for Bernard when his parents placed him in the Clinic, the District clearly acknowledged its responsibility for Bernard in the fall of 1989. During September and October of 1989, the District convened two IEP meetings, assessed Bernard, and formally proposed a placement for Bernard for the 1989-1990 school year.

Accordingly, the Court finds that Bernard's residency during 1989 and 1990 was the permanent address of his parents in San Jose. Therefore, the Union School District was responsible for the education of Bernard during 1989-1990 school year.

Hearing Officer's Amendment to the September IEP

The Smiths contend the that [sic] parameters of the September 1989 IEP did not define an appropriate educational placement for Bernard for the 1989-1990 school year. The hearing officer found that Bernard requires a 40-hour-per-week program instead of the 17.5 hour-per-week program that the District proposed. Further, the hearing officer found that "Bernard requires full-time, one-to-one assistance throughout his program rather than the unspecified amount of 'daily one-to-one instruction'

indicated in the Districts September IEP (Hearing Officer Decision p. 25). Finally, the hearing officer ordered that the parent training component of Bernard's program be increased from one hour weekly to five hours weekly, and that at least one-half of the parent training was to occur in Bernard's home. She based these decisions on the benefit Bernard experienced from his participation in the 40 hour per week program at the Clinic and the 'persuasive testimony' of the autism experts, Drs. Seigel and Kirchner. In addition, the hearing officer extended the amended September IEP through August 31, 1990.

Although the District's witnesses at the administrative hearing disputed the Smiths' proposed parameters of placement, the District in its motion for summary judgment does not raise any issues concerning the amendments to the IEP set forth in the hearing decision. The Court has independently reviewed the expert testimony regarding the IEP amendments and agrees with the findings of the hearing officer.

Proferred Educational Placements

The Smiths contend that the District formally offered only two placements, Coventry and Carlton, and that neither was an appropriate placement for Bernard. The District, on the other hand, contends only that it has programs, such as Mckinnon, which serve autistic children, and that it "reviewed" these programs with the Smiths, who rejected them.

The record shows that the District did not offer the Smiths its autistic programs. Bernard's program specialist

involved in the spring IEP recommended an early education class at Coventry School. When the Smiths visited Coventry, the school nurse and psychologist suggested they visit the preschool autistic program at Mckinnon (TR 3-163, 3-165). The record does not support the District's contention that it "reviewed" the McKinnon program with the Smiths. In fact, Bernard's program specialist, Cathi Serpa, did not recommend Mckinnon as an initial placement option for Bernard (T4-198-202).

With respect to Bernard's placement as a result of the September IEP, it is clear that the District only offered the Carlton program. The District, by letter dated November 1, 1989, offered the Carlton communicatively handicapped preschool class. The letter did not mention the possibility of placement at any other programs. Furthermore, the testimony of school officials who were most familiar with Bernard's case supports the contention that Carlton was the only program offered. First, Lyle Chambers, the Director of Special Services, testified that the Carlton class was, in his opinion, the most appropriate program available to meet Bernard's September IEP (TR 2-260). Second, Joe Pacheco, a program specialist involved in Bernard's placement, testified that he recommended a communicatively handicapped class rather than a class for autistic children because he believed that Bernard is less like a severely autistic child and has needs that are similar to communicatively handicapped children. Finally, Cathi Serpa testified that she considered other programs before recommending the Carlton class but felt that the McKinnon class was too restrictive for Bernard. She did not recommend McKinnon's preschool

autistic class because Bernard's primary areas of deficit are in language and attending.

Accordingly, the Court finds that the District offered the Smiths only the Carlton program as a placement for the 1989-1990 school year.

Appropriateness of Program Offered for School Year 1989-1990

As stated above the only program offered for school year 1989-1990 was the Carlton placement. The Smiths contend that Carlton was not an appropriate placement for Bernard. The District does not controvert this contention. The hearing officer found that the proposed Carlton placement was inappropriate. She found that Bernard needed to learn appropriate behaviors, socialization and communication skills in a one-to-one situation before he could benefit from group instruction in a pre-school class. After an independent review of the expert testimony, the Court agrees with the hearing officer that the Coventry and Carlton placements were not appropriate for Bernard.

Appropriateness of the Clinic

1. Is the Clinic an Allowable 'Related Service'?

The District contends that Bernard's IEP cannot be implemented at the Clinic because the Clinic is exclusively medical and therefore not an authorized 'related service' under federal law. The Smiths do not directly address this issue; however, they contend that the Clinic

is an authorized 'related service' under federal law. Furthermore, the Smiths contend that Bernard's IEP can be implemented at the Clinic because the Clinic provides 'designated instruction and services' (DIS) authorized under California Special Education law.

The IDEA requires state educational agencies to offer handicapped children free appropriate education, including 'related services.' 20 U.S.C. § 1401. Title 20 United States Code § 1401(18) defines 'related services' as "transportation, and such developmental, corrective, and other supportive services . . . including . . . counseling services . . . as may be required to assist a handicapped child to benefit from special education."

As previously stated, the IDEA incorporates the state's substantive and procedural standards concerning the education of handicapped children. California Education Code § 56441.8 provides that early education services for preschoolers may be provided by, among others, a certified nonpublic agency. In addition, Cal. Educ. Code § 56361 provides that 'designated instruction and services' (DIS) authorized under section 56363 can be a special education program option for implementing an IEP. Cal. Educ. Code § 56363(a) sets forth the (DIS) provision:

> Designated instruction and services as specified in the individualized education program (IEP) shall be available when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program. . . . [T]he appropriate designated instruction and services specialist shall provide such instruction and services.

California Education Code § 56363(b)(9)(11) provides that these services may include counseling, as well as parent counseling and training. Counseling as a DIS is addressed by three sections of the California Regulations implementing Special Education statutes: section 3051.9 defines Counseling and guidance Services; section 3051.10 defines psychological services as including "Counseling provided to an individual with exceptional needs by a credentialed or licensed psychologist or other qualified personnel; (b) Consultative services to parents, pupils, teachers, and other school personnel; (c) Planning and implementing a program of psychological counseling for individuals with exceptional needs and parents;" section 3051.11 authorizes Parent Counseling and Training, which may include "(a) Assisting parents in understanding the special needs of their child, and (b) Providing parents with information about child development."

The record shows that the Clinic is not exclusively "medical." There is no testimonial evidence that the Clinic is a medical treatment program. Furthermore, since September 12, 1989, the Clinic has been certified as a nonpublic agency to provide counseling services. The IDEA provides that counseling is an authorized 'related service'. Therefore, the Court finds that the District's contention that the Clinic is exclusively "medical" is without merit.

On the other hand, the Smiths' contention that Bernard's IEP can be implemented at the Clinic because the Clinic provides a DIS program does have merit. Section 56363 contemplates a situation where it is not feasible for the regular class teacher the special class teacher, or the resource specialist to provide the required 'designated

instruction and services' specified in the IEP. In such a situation, section 56363 states that "the appropriate DIS specialist shall provide such instruction and services."

Here, the appropriate DIS specialist was the Clinic. Bernard's IEP includes a 40 hour per week, intensive one-on-one behavior modification program. It has been established that the placements offered by the District did not include such a program and were therefore inappropriate. The Clinic is a certified nonpublic agency which provides counseling services. The services Bernard and his mother received at the Clinic fall within the services identified as counseling in the above California regulations. In the 40 hour a week, one-on-one program, "the clinic provides intensive behavior modification to teach Bernard compliance and attending skills. His program also stresses development of language, self-help, and socialization skills. The parent component of the program teaches Mrs. Smith how to reinforce the skills Bernard learns at the Clinic and trains her in behavioral management strategies." (Hearing Officer Decision p. 35). The program also includes participation in a preschool class.

2. Certification of the Clinic

The District contends that in June 1989, when the Smiths enrolled Bernard in the Clinic, the Clinic was not certified by the State of California to provide any services to handicapped children. Therefore the District contends that it could not have placed Bernard at the Clinic.

The Clinic was not certified to provide counseling services to handicapped children until September 12,

1989. Consequently, the hearing officer found that reimbursement before September 12, 1989 was inappropriate. The hearing officer, however, ordered reimbursement for costs related to Bernard's participation in the Clinic after its September 12, 1989 certification.

The record shows that the District could have properly placed Bernard in the Clinic for the school year 1989-1990. Under the IDEA and California Special Education law, a person or institution who provides services to handicapped students must be state certified. The Clinic was state certified to provide counseling services to handicapped children on September 12, 1989. Therefore, after Bernard's September 28, 1989 IEP the District could have enrolled Bernard in the Clinic if it had determined that the Clinic was an appropriate placement. Accordingly, the Court finds that the District's contention lacks merit.

Reimbursement for Lodging and Associated Costs

The District and the California Department of Education (CDE) contend that the hearing officer misapplied California's 'in lieu transportation' statutes when she awarded the Smiths reimbursement for lodging and associated costs in Los Angeles. The Smiths assert that under federal and state law they are entitled to reimbursement for lodging and related costs in lieu of daily transportation from their home in San Jose to the Clinic in Los Angeles.

Under federal and state law, handicapped children who are eligible for special education and or related services shall receive such services at no costs to the

parents. 20 U.S.C. §§ 1400 *et seq.*; Cal. Educ. Code § 56040. In some circumstances, a school district may be required to provide the related service of transportation. 34 C.F.R. Part 300.13(a). Under California education law, transportation can include lodging to handicapped pupils in lieu of providing the pupils with transportation between the pupil's home and the regular full-time day program he or she attends. Cal. Educ. Code § 41850(b)(3) and (d). The costs for lodging in lieu of transportation cannot exceed the daily transportation costs from the student's home to the school he attends. Cal. Educ. Code § 39807.

As stated above, Bernard required a 40 hour a week, one-on-one, intensive behavior modification program with a parent training component. The Clinic was the only appropriate program proposed for Bernard during the course of the administrative proceedings. Unfortunately, the Clinic was four hundred miles away from the Smiths' home in San Jose.

Bernard requires the related service of transportation in accordance with 34 C.F.R. Part 300.13(a). Neither the District nor the CDE dispute this conclusion. Daily transportation of Bernard from his home in San Jose to the Clinic in Los Angeles is not feasible. California Education Code § 41850 contemplates a situation where excessive distances are involved and allows apportionments for a school district which provides lodging to handicapped pupils in lieu of transportation services. Accordingly, the Court finds that the hearing officer correctly applied the California 'in lieu transportation' statutes when she ordered reimbursement for Bernard's lodging and associated costs.

Because Bernard required the participation of a parent in the Clinic program, the hearing officer found that Mrs. Smith's lodging costs should be reimbursed. The California 'in lieu transportation' statutes provide only for student lodging costs. However, since the parent component of Bernard's IEP is a critical aspect of his IEP, the Court finds that reimbursement for Mrs. Smith's lodging is allowable under California 'in lieu transportation' statutes.

CONCLUSION

Plaintiff Union School District's motion for summary judgment is denied. Defendant California Department of Education's motion for summary judgment is denied. Defendant Bernard Smith's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ James Ware
JAMES WARE
UNITED STATES
DISTRICT JUDGE

DATED: August 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNION SCHOOL DISTRICT, Plaintiff, v. BERNARD SMITH, *et al.*, Defendants.	CASE NO. C 90 20390 JW JUDGMENT (Filed Aug. 28, 1991)

Pursuant to the Court order of this date, "Order Re: Cross Motions For Summary Judgment," judgment is HEREBY ENTERED in favor of defendant Bernard Smith and against plaintiff Union School District and defendant California Department of Education.

IT IS SO ORDERED.

/s/ James Ware
JAMES WARE
UNITED STATES
DISTRICT JUDGE

DATED: 8/28/91

APPENDIX C

RELEVANT STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. Chapter 33

SUBCHAPTER I – GENERAL PROVISIONS

Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that –

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities and to

assess and assure the effectiveness of efforts to educate children with disabilities.

Sec. 1401. Definitions

(a) As used in this chapter –

* * *

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

* * *

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Sec. 1414 – Applications

* * *

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency –

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

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34 C.F.R. Part 300

Sec. 300.16 Related services

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services,

social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes –

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(5) "Occupational therapy" includes –

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" includes –

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes –

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended.

(11) "School health services" means services provided by a qualified school nurse or other qualified person.

(12) "Social work services in schools" includes –

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.

(13) "Speech pathology" includes –

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(14) "Transportation" includes –

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(a)(17))

Note: With respect to related services, the Senate Report states:

The Committee bill provides a definition of related services, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions. (S. Rep. No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.

There are certain kinds of services that might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Sec. 300.302 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Note: This requirement applies to placements that are made by public agencies for educational purposes, and includes placements in State-operated schools for children with disabilities, such as a State school for students with deafness or students with blindness.

CALIFORNIA EDUCATION CODE

PART 30. SPECIAL EDUCATION PROGRAMS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Intent

56000. The Legislature finds and declares that all individuals with exceptional needs have a right to participate in free appropriate public education and that special educational instruction and services for these persons are needed in order to ensure them of the right to an appropriate educational opportunity to meet their unique needs.

It is the intent of the Legislature to unify and improve special education programs in California under

the flexible program design of the Master Plan for Special Education. It is the further intent of the Legislature to assure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

It is the further intent of the Legislature that nothing in this part shall be construed to abrogate any right provided individuals with exceptional needs and their parents or guardians under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). It is also the intent of the Legislature that nothing in this part shall be construed to set a higher standard of educating individuals with exceptional needs than that established by Congress under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

* * *

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNION SCHOOL DISTRICT, CALIFORNIA
DEPARTMENT OF EDUCATION, CALIFORNIA
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents,
JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the concurrent findings of fact of the Court of Appeal, the District Court and the California Department of Education's Hearing Officer that respondent Bernard Smith required a program at the Clinic for the Behavioral Treatment of Children in Los Angeles, California and his parents should be reimbursed for all costs associated with providing the program for Bernard?[1]

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[1]The "Questions Presented" set forth in the Petition are not in fact presented by this case.

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Gregory K. v. Longview School District, 811 F.2d 1307 (9th Cir. 1987) 16, 18

Hendrick Hudson Bd. of Ed. Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) . . . . . *passim*

San Antonio Independent School District v. Rodriguez, 411 U.S. at 42, 93 S.Ct. at 1301, 102 S.Ct. at 3052 17

Town of Burlington v. Department of Education Commonwealth of Mass., 736 F.2d 773 (1st Cir. 1984), affirmed 471 U.S. 359, 105 S.Ct. 1986 (1985) . . . . . *passim*

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Statutes:

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No. 94-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

UNION SCHOOL DISTRICT, CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents, JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Bernard Smith opposes the Petition for Writ of Certiorari. Petitioners have not established any special or important reasons for this Court to review the decision below. Petitioners Questions Presented are all predicated on a factual dispute that was resolved by the California Department of Education Hearing Officer, the United States

District Court and the United States Court of Appeals for the Ninth Circuit and there is no conflict of law among the Circuit Courts raised by this case.

STATEMENT OF THE CASE

Bernard Smith, who resides with his family in the Union School District, qualifies for Special Education and related services under state and federal special education law. Bernard, who was a preschooler when this case was initially litigated, has been diagnosed as autistic.[2]

Because of their concern regarding Bernard's development, the Smiths first had him assessed at age two by several specialists to determine if there was a physical basis for his deficits. These evaluations done on separate occasions showed that Bernard's hearing was within normal range, that there were no speech pathological processes to interfere with speech development, and no neurological deficits. Appendix A, Hearing Decision, page 7.

In February 1989, the Smiths contacted the Union School District, requesting an assessment of Bernard. They expressed their concerns regarding his failure to develop speech and language, his inappropriate behavior, and delayed social development. Appendix A, Hearing Decision, page 7.

In their first contact with the school district, the Smiths were informed that the evaluator had difficulty completing assessments of preschool aged children in accordance with

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[2] For a more complete summary of Bernard's educational history and the course of the proceedings below, see the California Department of Education Hearing Decision attached hereto as Appendix A and the United States District Court Decision, attached as Appendix B to the Petition.

procedural timelines. By letter on February 21, 1989, the Smiths then requested that testing be conducted by another professional. They also sent the District copies of previous assessments of Bernard. Appendix A, Hearing Decision, page 7.

Attempts to assess Bernard's speech and language by the school district were of limited success. The school district report states that "Bernard's spontaneous speech is characterized by 'babbling' or 'jargon'. An identifiable single word or short phrase (two or three words) can be heard, however almost always in an echolalic behavior." The school evaluators also indicated that "Bernard is not interacting communicatively with his environment to the extent necessary for normal speech and language development." The school psychologist's notes indicate that Bernard had a very short attention span and that he "perseverated on blackboard." Appendix A, Hearing Decision, page 8-9.

Bernard was found eligible for Special Education services at the Individualized Education Program (I.E.P.) meeting of April 3, 1989, on the basis of language and attending deficits.[3] The I.E.P. team developed goals for Bernard in the areas of self-help, attending and communication. The school

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[3] For each disabled child eligible for special education, IDEA requires that an Individualized Education Program (IEP) be developed and reviewed at least annually by a multidisciplinary team including the child's parents and teacher. It contains, among other things, a statement of the annual goals and short-term instructional objectives for the individual child and criteria for determining at least annually whether instructional objectives are being achieved. Additionally, the Individuals with Disabilities Education Act (IDEA) explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. 20 U.S.C. §1415(b)(1)(C).

district team members recommended placement in an early childhood Special Education program three days per week for a total of 180 minutes. The team also found him eligible for the extended school year and recommended speech and language consultation and services as appropriate. John and Donna Smith consented to the I.E.P. goals, objectives, and recommended diagnostic placement. Appendix A, Hearing Decision, page 9.

On April 3, 1989, an interagency referral was made to the Special Education Local Plan Area (SELPA) Administrator, noting that Bernard had language delays, behavior problems, other developmental delays (suspected autism)." Appendix A, Hearing Decision, page 9.

Bryna Siegel, Ph.D., and Glen R. Elliott, Ph.D., M.D., of the Pervasive Developmental Disorders Clinic, University of California, San Francisco, evaluated Bernard on April 26, 1989. Using DSM III-R criteria, they concluded that Bernard exhibited eleven of sixteen criteria for diagnosis of an autistic disorder including "marked lack of awareness of people other than his parents; impaired imitation; lack of appropriate social play; inability to make peer friendships; severely impaired communication skills; abnormal nonverbal communication; insufficient language skills to initiate conversations; restricted repertoire of activities; persistent preoccupation with parts of objects; unreasonable insistence on following routines; and markedly restricted range of interests." Appendix A, Hearing Decision, page 10.

Drs. Siegel and Elliott, recommended an environment of low-intensity, minimum stimulation, and avoidance of unnecessary transitions. They also recommended an educational environment that provided extensive one-to-one instruction with focus on language pragmatics. Drs. Siegel and Elliott indicated that Bernard may be a good candidate for the Clinic for Behavioral Treatment of Children in

Los Angeles "which uses behavioral techniques to help overcome some of the negativistic and disconnected behaviors of autistic children." Appendix A, Hearing Decision, pages 10-11.

The school psychologist's report states that Bernard would soon be seen by Dr. Bryna Siegel and that "this evaluation will be very important to making long-range educational plans for Bernard." Appendix A, Hearing Decision, page 9.

On May 15, 1989, Bernard was placed by the District in a preschool class for the visually impaired at Coventry School, where he attended school three days per week for three hours daily. Bernard attended this class for approximately three weeks. At the end of the 1988-89 school year, the Smiths sought an alternative placement for Bernard at the Clinic, since they were concerned over his lack of progress in the District program. Appendix A, Hearing Decision, page 11.

On June 1, 1989, at the recommendation of Drs. Siegel and Elliott, the Smiths took Bernard to the Clinic for Behavioral Treatment of Children in Los Angeles, for the purpose of determining whether Bernard would be an appropriate candidate for the Clinic's program. The Clinic staff assessed Bernard and interviewed the Smiths. Appendix A, Hearing Decision, page 11.

The next I.E.P. meeting at the school district was held on June 6, 1989. The I.E.P. team incorporated the goals developed on April 3, 1989, into the new I.E.P. and noted that Bernard had made the following progress towards those goals and objectives: "Resistance and difficulty with scooping activity; voiced choice of snack 50% of the time; able to attend puzzle, circle time and coloring for two minutes; eye contact for total of five seconds; able to sit at circle with

adult intervention; cooperative in hand over hand imitation of gestures; able to give object to person 50% of the time." Appendix A, Hearing Decision, page 11.

The June 6, 1989 school district I.E.P. team members recommended "small group instruction in a Special Day Class (SDC) with teacher specialist; small group instruction with speech pathologist or consultation as appropriate for 60 minutes per week; and extended school year for four weeks." The Smiths consented to the June 6, 1989 I.E.P. goals and objectives but requested more intensive behavior modification intervention, socialization activities, and speech and language services. Appendix A, Hearing Decision, pages 11-12.

Bernard was accepted at the Clinic in Los Angeles and began the program on June 26, 1989. Following Bernard's acceptance, Mrs. Smith rented an apartment in Thousand Oaks in which she, Bernard, and his sister stayed during the week while Bernard participated in the Clinic program and Mrs. Smith obtained parent training. Appendix A, Hearing Decision, page 12.

By letter to Lyle Chambers, District Director of Special Education, on July 11, 1989, John Smith requested payment for Bernard's program at the Clinic and asked to meet in order to discuss Bernard's placement at the Clinic. By letter on August 15, 1989, John Smith requested an immediate I.E.P. meeting and asserted that Bernard's rights had been violated by the District in identification and assessment of his handicapping condition, as well as development and implementation of the I.E.P. John Smith also requested reimbursements for the evaluations by Drs. Siegel and Elliott. This letter is stamped "received August 18, 1989, L.C." Appendix A, Hearing Decision, pages 12-13.

On September 21, 1989, an I.E.P. meeting was held at the school district. The school district team members determined that Bernard needed to be assessed in speech and language areas. As a result, the school district evaluated Bernard at his home in San Jose on September 22, 1989. The report confirmed that Bernard had achieved remarkable improvement in language in the three months since he had attended the Clinic program. The report also noted social growth and indicated that Bernard was cooperative and responsive during testing. It is undisputed that Bernard has made progress at the Clinic. Appendix A, Hearing Decision, pages 13-14.

The I.E.P. meeting reconvened on September 29, 1989. Bernard's basis for Special Education eligibility was changed to "developmental delays," with a sub-classification of autistic. Goals and objectives addressing socialization, preacademic skills, self-help, receptive and expressive language were developed. The September 29, 1989 team recommended placement in a highly structured preschool SDC and a behavioral intervention program for Bernard which included parent consultation. The Smiths agreed with the goals and objectives developed at that meeting, but withheld their consent to the I.E.P. based on their objections to the description of the proposed educational program for Bernard. Appendix A, Hearing Decision, page 14.

At the September 29, 1989 I.E.P. meeting, the Smiths requested a 40-hour-per-week program with the following components: (1) Full time one-to-one with adults who have been extensively trained in behavioral interventions; (2) Opportunity for daily integration into a regular preschool; (3) Direct intervention in all environments of the child (i.e. home, school, community); (4) Written positive behavioral intervention program designed and supervised by a licensed/credentialed psychologist who is a specialist

in behavior intervention with preschool-aged autistic children; (5) Parent training 5 hours/week. Appendix A, Hearing Decision, pages 14-15.

The District offered: a highly structured SDC program of 180 minutes per day including the following: (1) One-to-one will occur daily; (2) 100% Special Education placement with the opportunity for daily integration; (3) Opportunity to generalize skills in community settings; (4) a written positive behavioral intervention program designed and supervised by a licensed and/or credentialed psychologist/specialist who is knowledgeable in the area of behavioral interventions with preschool aged autistic children; (5) Consultation with parent twice weekly for 30-45 minutes per session. Appendix A, Hearing Decision, pages 15-16.

The Smiths requested a due process hearing on October 13, 1989, regarding the issue of the appropriate educational placement for Bernard. No specific placement was offered until November 1, 1989, when by letter, Mr. Chambers offered to place Bernard at Carlton Elementary School in a Communicatively Handicapped Special Day Class upon Bernard's return to the District. Appendix A, Hearing Decision, page 16.

The administrative hearing was held on January 23, 24, 31 and February 1, 7 and 15, 1990 in San Jose, California before Mary L. Cote, hearing officer for the California Department of Education Special Education Hearing Office.

Based on the evidence presented, on June 18, 1990 the California Department of Education Hearing Officer made the following order: (1) Bernard's placement at the Clinic for Behavioral Treatment of Autistic Children for the 1989-90 school year including the extended school year is appropriate. (2) Within ten days of receipt of this order, Bernard's I.E.P. dated September 21 and 29, 1989, shall be

amended to include the following: (a) a 40-hour-per-week educational program; (b) a full-time, one-to-one individual extensively trained in behavioral intervention techniques; (c) parent training for five hours per week, of which at least 50 percent shall take place in Bernard's home; (d) transportation for Bernard and his mother between their home in San Jose and Los Angeles at the beginning and end of Bernard's participation in the program, at Thanksgiving, winter, spring and summer breaks; and between the Clinic and Bernard's residence in the Los Angeles area for each day he attends the Clinic. (3) Within ten days of receipt of this order, Bernard's I.E.P. dated September 21 and 29, 1989, shall be extended through August 31, 1990. (4) Within 30 days of receipt of this order, the District shall reimburse the Smiths for the costs associated with Bernard's placement at the Clinic for the 1989-90 school year, commencing with September 12, 1989, and continuing through the extended school year or until such time as the Clinic ceases to be certified as a nonpublic agency. Reimbursement shall include the following: (a) tuition in the amount of $4,000 per month less $467.84 paid by the Regional Center for parent training; (b) transportation costs, subject to proof, incurred by Mrs. Smith and Bernard for trips between the Smith's home in San Jose and Los Angeles at the beginning and end of Bernard's participation in the program, at Thanksgiving, winter, and spring breaks; (c) transportation between the Clinic and Bernard's residence in the Los Angeles area for each day he attends the Clinic, subject to proof; (d) costs associated with lodging for Bernard and his mother including rent at $895 per month and utilities (gas, electricity, and water) subject to proof. (5) Within 30 days of receipt of this order the District shall reimburse the Smiths in the amount of $650 for the cost of the evaluation made by Dr. Bryna Siegel on April 26, 1989. Appendix A, Hearing Decision, pages 70-71.

The school district brought an appeal of the hearing decision on July 2, 1990 to the United States District Court, Northern District of California. After hearing cross motions for summary judgment, the United States District Court upheld the hearing officer's decision on August 28, 1991. Petition, Appendix B.

The Ninth Circuit upheld the United States District Court and California Department of Education Hearing Officer on February 1, 1994. Petition, Appendix A. The Petition for a Writ of Certiorari was brought on September 7, 1994 after the denial of a Petition for Rehearing on June 9, 1994. Petition, Appendix A, page 20. Respondent Bernard Smith, for the reasons set forth below, opposes the Petition.

SUMMARY OF THE ARGUMENTS

The Petition before this Court is not about whether the Ninth Circuit stands alone among the circuits, nor does it involve questions of exceptional importance to school districts nationwide. No conflict exists among the circuits or is even alleged to exist. The Petition does not raise disputed questions of law. Rather, petitioners merely continue to dispute and attempt to relitigate the reasoned factual findings of this case.

Bernard Smith, the subject of this dispute, is a child with autism entitled to receive special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C., §1400 *et seq*.

At the time of the administrative hearing wherein the factual disputes were resolved, it was determined that in order to receive appropriate benefit Bernard required a forty hour per week educational program with a full time

one-to-one individual extensively trained in behavioral intervention techniques and parent training for five hours per week, of which fifty percent shall take place in Bernard's home, and transportation for Bernard and his mother between their home in San Jose and the Clinic for Behavioral Treatment of Children in Los Angeles, California and between the Clinic and Bernard's residence in the Los Angeles area for each day he attended the Clinic. Appendix A, Hearing Decision, page 70.

Petitioners have not raised at any stage of this appeal a dispute of the factual conclusion that Bernard requires these specific elements in his program nor have they claimed that they had or had offered a program which could meet these elements.

The administrative hearing officer was merely asked to review the appropriateness of a special day class for communicatively handicapped students at Carlton School. The school district never seriously contemplated proposing placement at an autistic program because their own witnesses believed these classes to be inappropriate for Bernard. Appendix A, Hearing Decision, pages 32, 34, 36 and 50. Petitioners chose to bring the appeal to conclusion by cross motions for summary judgment in the United States District Court, Northern District of California. Petitioners did not seek to supplement the factual record by either additional testimony or exhibits. Petition, Appendices A and B.

The Ninth Circuit and the District Court, after reviewing the petitioners arguments, concluded that Bernard's fact-specific program requirements were properly implemented at the Clinic for Behavioral Treatment of Children, the only program in California at that time which could implement Bernard's program. Petition, Appendices A and B.

This case arises under the Individuals with Disabilities Act (IDEA) formerly entitled the Education of the Handicapped Act (EHA), 20 U.S.C. §1400 *et seq.* The purpose of the Act is "to assure that all handicapped children have available to them. . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . ." 20 U.S.C. §1400(c). All states including California, which receive federal assistance for the education of handicapped children must comply with the procedural and substantive safeguards set forth in the Act. 20 U.S.C. §1412.

In order to provide the Clinic program to Bernard, who was then three years old, his parents were required to obtain lodging near the Clinic for Bernard and his mother. Bernard was too young to attend a residential school and parent training was a required component of his program. The costs of said lodging, including rental fees and utilities, and transportation costs from Bernard's home in San Jose, California were awarded to Bernard's parents as reasonable costs related to the program he required pursuant to the IDEA, 20 U.S.C. 1401(a)(17) and 34 CFR 300.13(b)(13) and under California Education Code Section 41850(b)(3), which states that transportation includes "providing board and lodging to pupils by a school district or county superintendent of schools made in lieu of providing for the transportation of pupils between their homes and the regular full time day schools they attend." In order to be provided with a free appropriate public education, the expenses associated with lodging for Bernard and his mother must be at no cost to them. Appendix A, Hearing Decision, pages 61-73. Had the Smiths commuted twice daily between San Jose and Los Angeles, the transportation costs would have far exceeded their more than reasonable lodging costs.

Neither question presented on page 1 of the Petition raises substantive issues, but merely repeats already litigated issues of fact, namely (1) whether the private day program in which the pupil was placed was "beyond a reasonable commute distance from the family's residence?" and (2) whether the parents "ignored the procedural safeguards of the IDEA?" Petitioners have not been able to successfully present evidence that there was an appropriate placement which could meet the specific program requirements found to be appropriate for Bernard within a reasonable commute from his home. No trier of fact in this case has held that Bernard's parents ignored the procedural safeguards of the IDEA. The California Department of Education Hearing Officer balanced the reasonableness of the Smiths actions with the school districts actions when applying the *Burlington* standard for reimbursement. Appendix A, Hearing Decision, pages 58-59.

The reasoned decisions below are not based on a novel application of the IDEA and have been fully addressed by this Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S.Ct 1986 (1985) and *Florence County School District Four v. Carter*, 141 S.Ct. 361 (1993).

The arguments proffered in the Petition are internally inconsistent. Petitioners argue on page 6 of their brief that this Court should grant Certiorari because "lodging" costs are not "related services." Yet, on page 9 of the Petition, petitioners admit that lodging for the child and food and non medical care must legally be paid for in residential school placements. In this case, the California Department of Education Hearing Officer, the United States District Court and the Ninth Circuit Court of Appeals all found that the only appropriate placement for Bernard, who resides with his parents in San Jose, California was the Clinic for

Behavioral Treatment of Children in Los Angeles, California. The Clinic has no facility for pupils to reside at the program nor was a residential school placement appropriate for Bernard.

The only way that Bernard, then a preschool age child, could attend the program was to reside nearby with his mother. The "lodging" for Bernard and "non medical care" was provided by his parents at a far more reasonable cost than the alternative of daily roundtrip airfare between San Jose and Los Angeles and was appropriately reimbursed by the California Department of Education Hearing Officer, the United States District Court and the Ninth Circuit. At every level of review, the Smiths actions have been found to be reasonable and practical given the lack of any available appropriate program option within a practical commute from their home.

Masking this factual dispute, petitioners misstate the reasons for the findings below and attempt to create a pretense of dissention in the circuits where none exists. The Petition must, therefore, be denied.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS MERELY SEEK REVIEW OF THE INDIVIDUALIZED FACTUAL DETERMINATIONS OF THE CALIFORNIA DEPARTMENT OF EDUCATION HEARING OFFICER AND THE DISTRICT COURT WHICH WERE AFFIRMED BY THE NINTH CIRCUIT THAT THE APPROPRIATE PROGRAM FOR BERNARD SMITH WAS AT THE CLINIC FOR BEHAVIORAL TREATMENT OF CHILDREN IN LOS ANGELES, CALIFORNIA AND ALL ASSOCIATED COSTS SHOULD BE REIMBURSED.

Petitioners' Questions Presented are an attempt to relitigate the factual findings of the California Department of Education Hearing Officer and federal district court which were affirmed by the Ninth Circuit. In particular, the petitioners, here as before the Ninth Circuit and the district court, object to the order to reimburse the Smiths for the costs of Bernard's program at the Clinic for Behavioral Treatment of Children, including the lodging costs.

Petitioners acknowledge that the findings of fact determined by the California Department of Education Hearing Officer and the United States District Court, adopted by the Ninth Circuit Court of Appeals, are not subject to review by this Court.

The Hearing Officer heard conflicting evidence and concluded that the Smiths' witnesses were more knowledgeable about and experienced with autism and programs for autistic children. The petitioners chose to bring this appeal to the district court by Cross Motions for Summary Judgment, but argued before the Ninth Circuit that there were issues of material fact rendering summary judgment improper. The Ninth Circuit held that "there are no disputed underlying facts". Petition App. 6. "Because we find no factual dispute

precluding summary judgment, we proceed to resolve this case on it's legal merits". Petition, App. A, pg. 8.

As the Ninth Circuit states "We give deference to the administrative findings of the Hearing Officer particularly when, as here, they are thorough and careful. See e.g. *Longview*, 811 F.2d at 310-11, *W.G.* 960 F.2d at 1483; accord *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). Petition, App. A, pg. 8.

The Ninth Circuit explained, "We, like the district court, must give 'due weight' to judgments of education policy when [we] review state hearings. [C]ourts should not substitute their own motions of sound educational policy for those of the school authorities which they review." *Longview*, 811 F.2d at 1311. Petition, App. A, pg. 8.

A. The Decision Of The Hearing Officer And The District Court In This Case Is Supported By A Preponderance Of The Evidence And Was Accorded Due Weight By The Ninth Circuit.

The Ninth Circuit Court correctly applied the standard of review outlined by the First Circuit in *Town of Burlington v. Department of Education Commonwealth of Mass.*, 736 F.2d 773 (1st Cir. 1984), *affirmed* 471 U.S. 359, 105 S.Ct. 1986, (1985). The *Burlington* Court held that-

> Because congress intended courts to make independent decisions-bound by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court–the question of the weight due the administrative findings of facts must be left to the discretion of the trial court. The traditional test of

> findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole. 736 F.2d at 791.

Using the *Burlington* standard, the Ninth Circuit upheld all of the Hearing Officer and District Court's findings. In addition to the *Burlington* standard, this Court has given further guidance to courts, stating that courts should give due weight to a Hearing Officer's placement decision, such as this decision, upheld by the Ninth Circuit on review.

The leading case interpreting the IDEA (formerly the Education for All Handicapped Act [EHA]), *Hendrick Hudson Bd. of Ed. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982) requires that a reviewing court give "due weight" to the administrative hearing decision regarding a special education placement. This Court in *Rowley* stated that the "preponderance of the evidence" standard "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* 458 U.S. at 206, 102 S.Ct. at 3051. This Court concluded that Congress, in passing the IDEA, shared the Court's view that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy" (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 42, 93 S.Ct. at 1301) and therefore, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id.* at 208, 102 S.Ct. at 3052.

The Ninth Circuit echoed *Rowley* in *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), stating that "the 'due weight' that courts must give to the state education agency's finding on matters of educational policy should prompt a more thorough explanation when reversing an agency's ruling on the appropriateness of a special education placement." *Id*, at 1314.

The District has the burden of proof in this case. The *Burlington* Court found that:

> "As a general principle. . . in such appeals the burden of proof is on the party who seeks to overturn the findings and decision of the agency. . . This allocation of proof is justified because it structurally assists courts in according the administrative agency's expertise the respect it is owed, an approach *Rowley* implicitly encourages." *Burlington*, 736 F.2d at 794.

Here, the California Department of Education Hearing Officer and the United States District Court properly found that Bernard's placement at the Clinic was appropriate and that the award of tuition and related costs was necessary in order for him to receive a free appropriate public education (FAPE) under the IDEA. The District has not met its burden to justify overturning the decisions both of the Hearing Officer and the District Court. Thus, giving due weight to the findings of the Hearing Officer and the District Court, their findings and decision should be upheld.

B. Petitioners' Assertion That The Ninth Circuit Misapplied The Related Service Provision Of The Federal Statute When Affirming The Order For Lodging Reimbursement Is A Mistatement Of The Facts And The Law In This Case.

With the voluminous administrative record as a guide, both the California Department of Education Hearing Officer and the United States District Court properly found that Bernard's placement at the Clinic conformed to the letter of the law and the expectations of Congress and the California Legislature. The Union School District failed to provide Bernard with a free appropriate public education as required by both federal and state law, and therefore, his parents properly enrolled him at the only appropriate program for a child of his unique needs, the Clinic for Behavioral Treatment of Children in Los Angeles, California.

The IDEA and state law guarantee that "all handicapped children have available to them. . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." (IDEA 20 U.S.C. §1400(c). This Court in *Board of Education v. Rowley*, in attempting to define the term, concluded that Congress intended to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. 176, 200, 102 S.Ct. 3034, 3048. This Court further explained that the requirements of a free appropriate public education are satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203, 102 S.Ct. 3049. The Hearing Officer found that the Clinic would provide this "basic floor of opportunity" for Bernard, and

thus, provided the educational benefit as required under *Rowley*. Appendix A, Hearing Decision, page 58.

The record provides ample evidence that the school district failed to offer Bernard an appropriate placement. Bernard was placed at the Coventry School after his April, 1989 I.E.P. Regarding this placement, the Hearing Officer stated that:

> the evidence establishes that Bernard required intensive Special Education services to remediate serious language, behavior, social, and attending deficiencies. The District instead provided him with minimal services in a class for visually impaired for total of 180 minutes per week. Bernard's needs were not similar to the needs of the other children in the class. . . Bernard did not receive the required speech and language services. Therefore, the District did not provide Bernard with specialized instruction and related services individually designed to provide him with benefit during the period from the time he was determined eligible for Special Education until his next IEP of June 1989. Appendix A, Hearing Decision, page 49.

In June, 1989, the school district offered no placement, and Bernard was enrolled at the Clinic for a three month trial period. Although the school district claimed that they did not need to offer a placement for the extended school year, as required by Bernard's June I.E.P., the Hearing Officer stated that:

> the District is not relieved of its responsibility to offer an appropriate placement for Bernard based on its perception that Bernard's parents preferred to enroll him in a summer program outside of the District. . . In order for the District to prevail at this hearing, it must establish that it did in fact have an appropriate placement for Bernard. Appendix A, Hearing Decision, page 50.

At Bernard's September 28, 1989 I.E.P., the Union School District again did not offer an appropriate placement for Bernard. It was not until November 1, 1989, after numerous letters to the District by Mr. Smith (Appendix A, Hearing Decision, page 51) that the Carlton school was actually offered to Bernard. After hearing testimony from various expert witnesses, the Hearing Officer determined that Bernard had not developed the skills necessary to benefit from the group classes at Carlton. "[T]he Carlton class does not provide that combination of facilities, personnel, location, and equipment that will enable Bernard to benefit educationally as required in *Rowley*." Appendix A, Hearing Decision, page 54.

The District Court held:

> The hearing officer found that the proposed Carlton placement was inappropriate. She found that Bernard needed to learn appropriate behaviors, socialization and communication skills in a one-to-one situation before he could benefit from group instruction in a preschool class [such as Carlton]. After an independent review of the expert testimony, the Court agrees with the hearing officer that the Coventry and Carlton placements were not appropriate for Bernard. Petition, App. B, pg. 35.

The District Court and the Ninth Circuit found, after reviewing the record, that Carlton was the only placement offered at that time. Petition, Appendix A, pg. 13 and Appendix B, pg. 35. Petitioners argue that the Ninth Circuit penalized the school district for a De Minimis error when the court ruled that the school district failed to formally offer the McKinnon school for autistic children, which the school district argued was an appropriate placement offered to Bernard. The quality of the McKinnon school was not relevant below; the program was neither appropriate nor

was it offered to Bernard. Petition, Appendix B, p. 33-34. The District Court found that the school district's program specialist, Cathi Serpa, did not recommend the McKinnon school because it was "too restrictive" for Bernard (Petition, Appendix B, p. 33-35) and that "the record does not support the school district's contention that it 'reviewed' the McKinnon program with the Smiths." Petition, Appendix B, p. 34.

The District was unable to implement Bernard's I.E.P. to provide Bernard with the educational benefit required in *Rowley*. The Smiths were thus forced to seek out the Clinic for Behavioral Treatment of Children in order to take over the District's responsibility of finding Bernard a placement reasonably calculated to enable him to receive educational benefit.

The IDEA requires state agencies to provide, as part of a free appropriate education, related services including "transportation, and such developmental, corrective, and other supportive services". . . "as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. §1401(17).

The California Department of Education Hearing Officer concluded after considering days of testimony and volumes of records:

> The evidence establishes that Bernard required intensive Special Education services to remediate serious language, behavior, social and attending deficiencies. The District instead provided him with minimal services in a class for visually impaired for a total of 180 minutes per week. Bernard's needs were not similar to the other children in the class. Bernard had behavioral, social, attending,. speech and language deficits, while the other children in the class were visually impaired and described by Mrs. Smith as "bright and well be-

haved". Bernard did not receive the required speech and language services. Therefore, the District did not provide Bernard with specialized instruction and related services individually designed to provide him with benefit during the period of time he was determined eligible for special education until his next I.E.P. of June 1989. Appendix A, Hearing Decision, pages 53-54.

The District's June 1989 I.E.P. did not adequately describe Bernard's needs. The hearing officer ruled that the I.E.P. must be amended to include:

a. 40-hour-per-week educational program;
b. a full-time one-to-one individual extensively trained in behavioral intervention techniques;
c. parent training for five hours per week of which 50% shall take place in Bernard's home;
d. transportation for Bernard and his mother between their home in San Jose and Los Angeles at the beginning and end of Bernard's participation in the program, at Thanksgiving, Winter, Spring and Summer Breaks, and between theClinic and Bernard's residence in the Los Angeles area, for each day he attends the Clinic. Appendix A, Hearing Decision, page 70.

The school district has not raised issues on appeal related to the ordered I.E.P. amendments, nor have they even asserted that the Carlton class can implement these I.E.P. requirements. In order to prevail in this action, the school district must establish that it did in fact offer an appropriate placement. It has not, nor do Petitioners raise the issue herein. Giving due weight to the Hearing Officer and the District Court, the Ninth Circuit also found that the Clinic was the only appropriate program for Bernard.

II.

ACCORDING TO *BURLINGTON*, THE SMITHS PROPERLY PLACED BERNARD AT THE CLINIC FOR BEHAVIORAL TREATMENT OF CHILDREN AND SHOULD BE REIMBURSED FOR THEIR COSTS.

Because the school district failed to offer any appropriate placements to Bernard, his parents were authorized to unilaterally place him in the only appropriate program, the Clinic for Behavioral Treatment of Children, and they should recover costs for that placement. The triers of fact did not believe that the Smiths violated the procedural safeguards of the IDEA. Petitioners attempt to mislead this Court by insinuating that the issue was not considered below.

To the contrary, the determination below regarding the reasonableness of the Smiths' actions was reached after carefully considering the facts of this case. As the *Burlington* Court stated,

> [We]e do not agree that a unilateral parental move constitutes a bar to reimbursement of the parents if their actions are held to be appropriate at final judgment. *Burlington*, 736 F.2d 773, 799.

In *Burlington*, the First Circuit held that parents could be reimbursed for their expenses when they unilaterally placed their child in a nonpublic setting provided that the nonpublic program was appropriate. As in the instant case, the Hearing Officer in *Burlington* found that the child's I.E.P. and placement in the school district was inadequate and inappropriate, and that the parents had appropriately placed the child in the private school. The First Circuit Court of Appeals awarded the parents costs of that placement. This Court, in affirming the First Circuit's decision, held that the IDEA directs the court to:

> grant such relief as [it] determines is appropriate. . . In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school. *Burlington*, 471 U.S. 359, 369 (1985).

Despite the fact that the Clinic was successfully implementing Bernard's I.E.P., as the District had failed to do, the school district refused to authorize placement at the Clinic at Bernard's September 29, 1989 I.E.P. Instead, they offered no placement until November 1, 1989, when they offered only Carlton, an inappropriate placement. Petition, Appendix B, p. 34-35.

The Hearing Officer determined that the Smiths acted properly under the IDEA and the school district did not.

> [w]hile the District has not acted in bad faith, it has acted slowly and has attempted to relieve itself of the duty to educate Bernard. . . As parents concerned for their child's development and education, the Smiths properly placed Bernard at the Clinic, the only appropriate program recommended to them by autism experts. The District was not relieved of its responsibility to offer an appropriate placement for Bernard based on its perception that Bernard's parents "preferred" to enroll him in a summer program outside of the District. Because Bernard was eligible for special education, the District was responsible for offering Bernard an appropriate program for the extended school year of 1989 and the 1989-90 term; it did not, however. Appendix A, Hearing Decision, page 59.

For these reasons, the school district has been properly required to reimburse the Smiths for the costs, including lodging, which they incurred in sending Bernard to the Clinic. As the *Burlington* Court concluded, the reimbursement for placing a child unilaterally in a private program "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 371.

The Clinic is located approximately four hundred miles from Bernard's home. This distance is obviously beyond a practical and cost efficient daily commuting distance. Since the District failed to place Bernard in an appropriate public setting closer to his home, and the Clinic was the only appropriate placement, the school district has been properly required to reimburse Bernard's parents for his reasonable lodging and associated costs necessary to maintain his placement at the Clinic. Without reimbursement for these costs, the placement would not satisfy the IDEA's requirement of a free and appropriate education. (FAPE)

Both the Hearing Officer and the District Court found that in order for Bernard to receive a free appropriate education, his parents should be reimbursed for the lodging and associated costs of his placement at the Clinic. The Petitioners argue that Bernard and his mother improperly acquired a "second dwelling" in Los Angeles and are not entitled to any reimbursement for lodging costs. Lodging is not, as Petitioners claim, "a curious euphemism for reimbursing parents for second dwellings." (Petition, p. 6, footnote 1). The record reflects that Bernard and his mother lodged near the Clinic so that he could receive the education and training that the District failed to provide him. Thus, the issue is not one of "second dwellings", as the

Petitioners argue but whether related costs were properly required in order to provide FAPE.

It should be noted that at no time have Bernard's parents sought, nor do they now seek, a 24 hour residential program for him. Bernard requires an 8 hour daily program, or a 40 hour week, in order to implement his I.E.P. Appendix A, Hearing Decision, page 70. The Petitioners do not contest this finding, nor do they contest the finding that the Clinic is an appropriate program for Bernard. The Petitioners do not suggest that the school district proposed an appropriate program for Bernard, nor do the Petitioners contest the fact that the Clinic program is the only appropriate program and cannot be provided to Bernard in a free and appropriate manner, as required by the IDEA, unless lodging and associated costs are awarded to Bernard's parents, nor do they suggest that a daily commute would be less expensive.

It is clear that given the fact that the Clinic was the only appropriate program proposed for Bernard during the course of the administrative proceedings, the hearing officer had no choice but to award lodging costs to Bernard's parents. In fact, the only person who would suffer irreparable harm herein is Bernard Smith, without the provision of the Clinic program. We must not lose sight of the fact that the federal mandate is to provide for the unique needs of individuals with disabilities, such as Bernard.

The incidence of autism of Bernard's type is so unique that Dr. Bryna Siegel, a leading expert in the field of autism, recommended the Clinic program and testified that she would not have expected to see the progress Bernard made in less than seven months in the Clinic program in three years time in a good program. Appendix A, Hearing Decision, page 21. Clearly the costs associated with this program, including lodging, is one envisioned by the legislators, when they enacted Section 20 U.S.C. §1401(17).

There is nothing ambiguous or novel about the federal requirement that the unique needs of each handicapped student be identified and met in a specialized and individualized program, which is free and appropriate to the student and his parents, nor is there anything ambiguous or novel about the fact that states are obligated to enact laws to implement the IDEA. The Ninth Circuit has not rewritten the IDEA in this case. The Petition does not suggest that any other circuit has or would have reached a different conclusion given the same set of facts which are present in the record of this case.

The petitioners allege that the school district is somehow unfairly penalized for a "De Minimis" error, created when it failed to properly offer an appropriate placement to Bernard, and thus the petitioners seek sympathy for what they call a "common tactic of parent advocates since this Court's first decision concerning unilateral placements in *Burlington*." However, the IDEA specifically requires prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of the child. 20 U.S.C. §1415(b)(1)(C); Petition, App. A, pg. 13.

More importantly, the petitioners fail to recognize the fact that the frightening aspect of this case is that Bernard's school district ignored his needs, did not provide him with either an appropriate I.E.P., or an appropriate placement, or appropriate services, and attempted to relieve itself of the duty to educate Bernard by asserting that Bernard did not reside within its jurisdictional boundaries. Appendix A, Hearing Decision, pages 38-39.

III.
CONCLUSION

Both the Hearing Officer and the District Court relied on an abundance of evidence and a lengthy administrative record to determine that Bernard Smith was properly placed at the Clinic for Behavioral Treatment of Children and therefore properly found that his parents should be reimbursed for his costs associated with that placement. Giving due weight to these decisions, the Ninth Circuit properly upheld the decisions of the triers of fact. The petitioners have not met their burdens of proving that the Hearing Officer, the District Court, or the Ninth Circuit erred in their findings or their decisions.

Because there is no conflict among the circuits, nor confusion in the law, the petition for a writ of certiorari must be denied.

Respectfully submitted,

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APPENDIX A

California June 18, 1990

No. 404-89H

Union Elementary School District

Counsel for Student: Kathryn Dobel, Attorney at Law

Counsel for District: Jane B. Slenkovich, Attorney at Law

Hearing Officer: Mary L. Cote

The parents of a four-year-old, autistic child sought an order requiring the district to pay for the child's placement in a clinical program which emphasized behavioral techniques in the treatment of autism. Under the district's IEP, the child initially attended a preschool class for visually impaired students; the parents maintained, however, that the district did not address adequately the child's behavioral deficits. After investigating the clinic, located on the campus of UCLA, the parents unilaterally placed the child in the clinic's program. Because of the clinic's distance from the family home, the parents rented an apartment in Los Angeles, where the mother and child lived while the child attended the program. The district denied the parents request to assume the costs of the clinical program, and the parents then initiated administrative proceedings.

HELD: for the parents.

The hearing officer determined that the child required intensive services to remediate deficits in language, behavior and social skills, but the district's placement of the child in a visually impaired preschool class failed to address any of these needs. The district's subsequent proposals for placement in a severely handicapped or communicatively handicapped classroom were similarly inappropriate. The clinic's program, however, was designed to address the child's unique needs for structure, intensity and consistency, and the child demonstrated a degree of developmental progress in the clinic's program which ultimately could enable him to be placed in a district program. Thus, the clinic's program represented an appropriate educational placement for the child. The hearing officer ordered the district, therefore, to amend the child's IEP to include placement in the clinic's program, a one-on-one behavioral intervention aide, five hours per week of parent training, and transportation for the mother and child to and from Los Angeles at the beginning and end of the program and during vacations. The hearing officer also required the district to reimburse the parents for the clinic's tuition of $3,532.16, the cost of lodging in Los Angeles at $895.00 per month, and associated transportation costs.

DECISION

PROCEDURAL MATTERS

At the commencement of the hearing, the District renewed its Motion to Dismiss based on lack of jurisdiction that it had previously made in writing on November 15, 1989. In denying the District's motion initially, the Chief Hearing Officer stated that the issues would be resolved by a due process hearing.

The District again renewed its Motion to Dismiss after the testimony of Tristam Smith, Assistant Clinic Director, asserting that it is a legal impossibility for the District to fund Bernard's treatment at the clinic because the clinic is not a certified nonpublic school. The District also asserted that it is not responsible for the therapy Bernard receives there because therapy, a related service, "legally must support a Special Education program—which Bernard is not receiving."

The District also made a Motion to Join the Los Angeles Unified School District as a party to this hearing. The Hearing Officer denied the District's motions because the issues involved questions of fact to be resolved through evidence presented at the hearing.[1]

ISSUES

1. Is the District responsible for educating Bernard?

2. Shall Bernard's current IEP be amended to include a 40-hour educational program containing the following components:

a. a full-time individual extensively trained in behavioral intervention techniques to work one-to-one with Bernard;

b. opportunity for daily integration into a regular education preschool;

c. a behavioral intervention program supervised by a licensed, credentialed psychologist who is a specialist in behavioral intervention with preschool-aged autistic children;

d. parent-training for five hours per week;

e. direct intervention in all of the child's environments, including home, school, and community?

3. Shall Bernard's current Individual Education Plan (IEP), dated September 21 and 29, 1989, be extended through August 31, 1990?

4. Has the District offered an appropriate educational placement for Bernard?

5. If not, is the Clinic for Behavioral Treatment of Autistic Children at the University of California, Los Angeles, an appropriate placement for Bernard?

a. If so, is transportation between Bernard's home in San Jose and the Clinic a required related service?

b. If so, are lodging and associated costs while Bernard attends the Clinic also required related services?

c. If so, are Bernard's parents entitled to reimbursement for expenses associated with Bernard's placement at the Clinic, retroactive to June 26, 1989, including:

1. tuition;

2. transportation between their home in San Jose and the Clinic;

3. lodging and associated costs?

6. Are Bernard's parents entitled to reimbursement for the cost of an evaluation made by Dr. Bryna Siegel on April 26, 1989 for the amount of $650?

7. Should they prevail, are Bernard's parents entitled to attorney fees and expert witness costs incurred in relation to this hearing?

CONTENTIONS OF THE PARTIES

The [ ]s contend that the District is responsible for Bernard's education because he resides within the jurisdictional boundaries of the District. The [ ]s assert that, although Bernard's IEP of September 1989, was for only six months, the IEP team developed annual goals and objectives that continue to be appropriate for Bernard and that Bernard's IEP of September 1989 should therefore be extended through August 31, 1990. They also assert that certain parameters of placement must be added to the IEP in order to define an appropriate program for Bernard. The [ ]s assert that, under California Education Code Section 56302 and Title 5, California Code of Regulations, Section 3001(b), the District is required to provide an educational program that best meets Bernard's needs and appropriately provides Bernard with the opportunity to achieve his full potential. The [ ]s contend that the District does not now and has not at any time offered an appropriate educational program for Bernard. The [ ]s further contend that the Clinic is the only appropriate placement for Bernard and has been since June 26, 1989, when he was enrolled there. The [ ]s contend that the District referred them to Dr. Siegel for an assessment of Bernard's specific disability and is therefore responsible for the cost of that assessment.

The District contends that it is not responsible for Bernard's education because he does not reside within its jurisdictional boundaries. The District asserts that Bernard resides instead in the Los Angeles area because he

lives, eats, and sleeps in Los Angeles with his mother during the school week. The District further contends that, even if it were responsible for educating Brian, it would not be responsible for costs associated with the program in which Bernard is currently enrolled because the Clinic for Behavioral Treatment of Autistic Children located at the University of California, Los Angeles, is not certified to provide Special Education services. The District asserts that the Clinic is limited to providing counseling services which only O. Ivar Lovaas, Ph.D., Psychologist and Clinic Director, is qualified to deliver. The District also contends that it is able to provide an appropriate education for Bernard, if and when he returns to the District.

BACKGROUND FACTS

It is undisputed that Bernard qualifies for Special Education services under state and federal Special Education law. Bernard, who will turn four years old on May 16, 1990, has been diagnosed as autistic. The [ ]s enrolled Bernard in the District's Special Education program in the Spring of 1989. Bernard attended a Special Day Class for the visually impaired at Coventry School through June 15, 1989. At the end of the 1988-89 school year, the [ ]s sought alternative placement for Bernard at the Clinic, located on the campus of UCLA. As a part of his treatment program, Bernard attends preschool once a week. The [ ]s decision to pursue this placement was based in part on Bernard's educational experiences in the District, investigation of other programs offered by the District for Bernard, and the prospects for successful remediation of Bernard's deficits offered by the Clinic's program.

Because of their concern regarding Bernard's development, the [ ]s had him assessed at age two by several specialists to determine if there was a physical basis for his deficits. These evaluations done on separate occasions showed that Bernard's hearing was within normal range, that there were no speech pathological processes to interfere with speech development, and no neurological deficits. (See Exhibits 5, 8, and 33) Dr. Hawes, a Pediatric Neurologist described Bernard as active, bright, and alert. He also noted that Bernard knew numbers and letters, used simple words, rarely performed on request or participated in activities with others. Dr. Hawes recommended that the [ ] contact their local school district for psychometric, speech, and behavioral evaluations. (Exhibit 7) Bernard's teacher at the Explorer Preschool similarly advised the [ ].

In February 1989, the [ ]s contacted the District, requesting an assessment of Bernard. They expressed their concerns regarding his failure to develop speech and language, his inappropriate behavior, and delayed social development. Their first contact in the District, Aiko Fadness, a District Speech and Language Specialist, told them she had difficulty completing assessments of preschool aged children in accordance with timeliness. By letter on February 21, 1989, the [ ]s then requested that testing be conducted by another District speech therapist. They also sent the District copies of previous assessments of Bernard. (Exhibit 6) Ms. Fadness referred the [ ]s to Barbara Milligan, District School Psychologist, with whom Mrs. [ ] met on March 1, 1989. Ms. Milligan completed a referral form and developed an Assessment Plan to which Mrs. [ ] gave her consent. (Exhibits 9 and 10)

Attempts to assess Bernard's speech and language by the District were of limited success. Joan Bowen, District

Speech and Language Specialist, and Joe H. Pacheco, Program Specialist, conducted their assessment of Bernard over two one and one-half hour sessions. The first session was at a District school. Their report described Bernard as "cheerful, happy, and extremely interested in his surroundings" at the beginning of the session and "unresponsive, resistant, and easily distracted" as they attempted to administer the tests. The second session was at the [ ]s home. Ms. Bowen and Mr. Pacheco were unable to administer standardized testing instruments and procedures so they based their findings on observations of Bernard's play, as well as information they obtained from Bernard's parents. The examiners concluded that Bernard's receptive and expressive language was at approximately a one-year level. Their report states that Bernard's spontaneous speech is characterized by 'babbling' or 'jargon.' An identifiable single word or short phrase (two or three words) can be heard, however almost always in an echolalic behavior." They also indicated that "Bernard is not interacting communicatively with his environment to the extent necessary for normal speech and language development." (Exhibit 15)

Ms. Milligan observed Bernard at his preschool and attempted to test Bernard on two different occasions, once at a District school and once at the [ ]s home. Bernard participated in a few tasks involving placing pegs in holes and blocks in a box. On the Merrill-Palmer Scale of Mental Tests, Bernard obtained a score of ten. Bernard was two years, nine months old at the time of the assessment. Ms. Milligan obtained the following developmental skill age profile on the Alpern-Boll Developmental Profile II: Physical age—26 months; self-help age—20 months; social age—16 months; academic age—22 months; communication age—18 months. She did not obtain an I.Q.

equivalency score. Ms. Milligan's notes indicate that Bernard had a very short attention span and that he "perseverated on the blackboard." Ms. Milligan's report notes that Bernard would soon be seen by Bryna Siegel and that "this evaluation will be very important to making long-range educational plans for Bernard." (Exhibit 16)

By letter of March 29, 1989, Dr. [ ] requested the District perform hearing, audiology, and eye examinations of Bernard prior to the initial IEP meeting scheduled for April 3, 1989. Dr. [ ] noted his concern regarding Bernard's speech and language development, hearing, and lack of a startle reflex. (Exhibit 13) A hearing test was performed the next day by Janet Lang Zurovski, District Educational Audiologist. She recommended further evaluation of what she described as "stiff middle ear systems and fluid in the middle ear cavities." (Exhibit 14) Subsequently, Bernard had tubes surgically inserted to drain fluid from his middle ear.

Bernard was found eligible for Special Education services at the IEP meeting of April 3, 1989, on the basis of language and attending deficits. The IEP team developed goals for Bernard in the areas of self-help, attending and communication. The team recommended placement in an early childhood Special Education program three days per week for a total of 180 minutes. The team also found him eligible for the extended school year and recommended speech and language consultation and services as appropriate. Dr. and Mrs. [ ] consented to the IEP goals, objectives, and recommended placement. (Exhibit 17)

On that same date, an interagency referral was made to B. J. McCallum, SELPA III Administrator. The form notes that Bernard had "language delays, behavior problems, other developmental delays (suspected autism or

P.D.D.)" (Exhibit 18) A Referral Action Log dated April 7, 1989, recommended routing of the referral to Joe Fimiani, Director of Special Education, Santa Clara County Office of Education, indicating that Bernard would be placed in the Coventry Early Education program commencing on April 18, 1989, and continuing through the summer of 1988 for diagnostic purposes. (Exhibit 19)

Bryna Siegel, Ph.D., and Glen R. Elliott, Ph.D., M.D., of the Pervasive Developmental Disorders Clinic, University of California, San Francisco, evaluated Bernard on April 26, 1989. Using DSM III-R criteria, they concluded that Bernard exhibited eleven of sixteen criteria for diagnosis of an autistic disorder including "marked lack of awareness of people other than his parents; impaired imitation; lack of appropriate social play; inability to make peer friendships; severely impaired communication skills; abnormal nonverbal communication; insufficient language skills to initiate conversations; restricted repertoire of activities; persistent preoccupation with parts of objects; unreasonable insistence on following routines; and markedly restricted range of interests." The report also states that their testing showed moderate mental retardation, although they indicated that a more precise assessment would be appropriate when Bernard was cooperative. They also indicated interest in Bernard's hyperarousability, resistance to change, and degree of connectedness with his parents, and concluded that he is "likely to be relatively high functioning when older." Drs. Siegel and Elliott recommended an environment of low-intensity, minimum stimulation, and avoidance of unnecessary transitions. They also recommended an educational environment that provided extensive one-to-one instruction with focus on language pragmatics. Drs. Siegel and Elliott

indicted that Bernard may be a good candidate for the Clinic for Behavioral Treatment of Children in Los Angeles "which uses behavioral techniques to help overcome some of the negativistic and disconnected behaviors of autistic children." (Exhibit 23)

On May 15, 1989, Bernard was placed by the District in a preschool class for the visually impaired at Coventry School, where he attended school three days per week for three hours daily. The classroom teacher was Ginger Brown. Bernard attended this class for approximately three weeks.

On June 1, 1989, the [ ]s took Bernard to the Clinic for Behavioral Treatment of Children in Los Angeles, for the purpose of determining whether Bernard would be an appropriate candidate for the Clinic's program. The Clinic staff assessed Bernard and interviewed the [ ]s. Using the Bayley Scales of Infant Development, Tristam Smith, Assistant Clinic Director, obtained an I.Q. of 64. (Exhibit 27) With Bernard's mother as respondent, Mr. Smith obtained the following age equivalent scores on the Vineland Adaptive Behavior Scales: Communication–13 months; Daily Living Skills–16 months; Socialization –23 months; Motor Skills–27 months. (Exhibit 28)

The next IEP meeting at the District was held on June 6, 1989. The IEP team incorporated the goals developed on April 3, 1989, into the new IEP and noted that Bernard had made the following progress towards those goals and objectives: "Resistance and difficulty with scooping activity; voiced choice of snack 50% of the time; able to attend puzzle, circle time and coloring for two minutes; eye contact for total of five seconds; able to sit at circle with adult intervention; cooperative in hand over hand imitation of gestures; able to give object to person 50% of the time." The team recommended "small group in-

struction in a Special Day Class (SDC) with teacher specialist; small group instruction with speech pathologist or consultation as appropriate for 60 minutes per week; and extended school year for four weeks." (Exhibit 31) The [ ]s consented to the IEP goals and objectives but requested more intensive behavior modification intervention, socialization activities, and speech and language services.

Bernard was accepted at the Clinic in Los Angeles and began the program on June 26, 1989. In the interim, Mrs. [ ] rented an apartment in Thousand Oaks in which she, Bernard, and his sister stay during the week while Bernard participates in the Clinic program and Mr. [ ] obtains parent training. On June 27, 1989, Laurie Eisenberg of the Clinic assessed Bernard on the Reynell Developmental Language Scale and on the Bayley Scales of Infant Development. Bernard obtained an age equivalent score of 23 months on both. (Exhibits 35 and 36)

By letter to Lyle Chambers, District Director of Special Education, on July 11, 1989, Dr. [ ] requested payment for Bernard's treatment at the Clinic and asked to meet in order to discuss Bernard's placement at the Clinic. (Exhibit 37) By letter of July 12, 1989, addressed to Dr. [ ], Dr. Elliott reiterated his referral of Bernard to the Clinic for the purposes of "behavioral modification of his hyperarousability and resistance and for speech and occupational therapy." His letter also indicates that Bernard was diagnosed as autistic and moderate mentally retarded, discusses autism in general, and describes the treatment provided to Bernard at the Clinic. (Exhibit 38). By letter on July 21, 1989, Lyle Chambers, District Director of Special Services, responded to a telephone conversation with Dr. [ ] and to Dr. [ ]'s letter of July 11, 1989. In his letter, Mr. Chambers indicated that after

consulting with Ms. McCallum and Paul Starkovich of the State Department of Education, he came to the conclusion that the District could not implement the IEP developed for Bernard because he was not a resident of the District and also because the Clinic was not certified to provide Special Education. (Exhibit 40)

By letter on August 15, 1989, Dr. [ ] requested an immediate IEP meeting and asserted that Bernard's rights had been violated by the District in identification and assessment of his handicapping condition, as well as development and implementation of the IEP. Dr. [ ] also requested reimbursements for the evaluations by Drs. Siegel and Elliott, ENT, and Pediatric Neurology consultants. This letter is stamped "received August 18, 1989, L.C." (Exhibit 46)

On September 18, 1989, the Clinic in Los Angeles readministered the same assessment instruments utilized to evaluate Bernard in June of 1989. (The Merrill-Palmer had been administered in April of 1989) Bernard obtained age equivalent scores as follows: Bayley—30 plus months (a 7 month gain); Merrill-Palmer—37 months (a 15 month gain); Reynell Language Comprehension—27 months (8 month gain) and Expressive Language—37 months (19 month gain); Vineland Composite—83 months (18 month gain). (Exhibits 49, 51, 53, 54, and 55) On the Stanford-Binet Intelligence Scale, administered by T. Smith on September 18, 1989, Bernard obtained a score of 92. (Exhibit 52)

On September 21, 1989, an IEP meeting was held at the District. The team determined that Bernard needed to be assessed in speech and language areas. As a result, Ms. Bowen, assisted by Ms. Fadness, evaluated Bernard at his home on September 22, 1989. Utilizing the Sequenced Inventory of Communication Development (SDIC), Ms.

Bowen determined that Bernard's expressive language was at the 28 month level with strengths through the 40 month level. She assessed his receptive language at the 28 month level also, with strengths through the 48 month level. Ms. Bowen also took a language sample totaling 75 words (100 is normal for his age) from which she determined that Bernard's mean length of utterance was two and one-half words (four and one-half words are average for his age); that he uses nouns, verbs, and adverbs; and that pronouns are emerging in his language. Ms. Bowen indicated in her report that more complex sentences are emerging in Bernard's spontaneous language; however, she described his sentences as "more programmed than spontaneous." In her report she also remarked she was impressed by the remarkable improvement in language that Bernard had achieved in three months. She also noted social growth and indicated that Bernard was cooperative and responsive during testing. (Exhibit 56)

The IEP meeting reconvened on September 29, 1989. Bernard's basis for Special Education eligibility was changed to "delays," with a sub-classification of autistic. Goals and objectives addressing socialization, preacademic skills, self-help, receptive and expressive language were developed. The team recommended placement in a highly structured preschool SDC and a behavioral intervention program for Bernard which included parent consultation. The [ ]s agreed with the goals and objectives developed at that meeting, but withheld their consent to the IEP based on their objections to the description of the proposed educational program for Bernard. (Exhibit 58) The [ ]s requested a 40-hour-per week program with the following components:

1. Full time one-to-one with adults who have been extensively trained in behavioral interventions;

2. Opportunity for daily integration into a regular preschool;

3. Direct intervention in all environments of the child (i.e. home, school, community);

4. Written positive behavioral intervention program designed and supervised by a licensed/credentialed psychologist who is a specialist in behavior intervention with preschool-aged autistic children;

5. Parent training 5 hours/week.

The typewritten portion of Exhibit 59 is the [ ]s description of an appropriate program for Bernard; the handwritten notes indicate what the District offered.

Bernard's IEP (Exhibit 58) indicates a highly structured SDC program of 180 minutes per day and includes the following:

1. One-to-one will occur daily;

2. 100% Special Education placement with the opportunity for daily integration;

3. Opportunity to generalize skills in community settings;

4. A written positive behavioral intervention program designed and supervised by a licensed and/or credentialed psychologist/specialist who is knowledgeable in the area of behavioral

interventions with preschool and autistic children;

5. Consultation with parent twice weekly for 30-45 minutes per session.

By letter on November 1, 1989, Mr. Chambers offered to place Bernard at Carlton Elementary School in a Communicatively Handicapped Special Day Class upon Bernard's return to the District. He also indicated that Pat Kovattana, a Behavior Management Consultant, would be available to work with Bernard's teacher and the [ ]s. (Exhibit 68)

The [ ]s requested a due process hearing on October 13, 1989, regarding the issue of the appropriate educational placement for Bernard. Mediation on November 6, 1989, was unsuccessful. Bernard has continued to participate in the Clinic's program in Los Angeles.

SUMMARY OF TESTIMONY

The [ ]s

Dr. [ ] testified regarding the threshold issue of whether Bernard resides within the jurisdictional boundaries of the District. Dr. [ ] testified that he resides at [ ] San Jose, California, with his wife, infant daughter, and Bernard. He stated that he and his wife are neither divorced nor separated. Dr. [ ] indicated that he does not intend to change his residency, has his medical practice nearby, and is registered to vote in San Jose. During the school week, his wife, daughter, and Bernard sleep at an apartment they have rented on a month to month lease in Sherman Oaks so that Bernard can attend a Special Education program located on the UCLA campus. He testified that upon completion of the program, Mrs. [ ] and the children intend to permanently return to their home

in San Jose. Dr. [ ] also stated that the family returns to San Jose on weekends and for all holiday and vacation periods.

Mrs. [ ] testified that after the IEP meeting of April 3, 1989, she observed placement sites proposed by the District at Coventry, McKinnon, and Sherman Oaks schools. She indicated that she observed an Early Childhood Education (ECE) class at Coventry with the school psychologist and nurse, who indicated to her their concern that Bernard was too big for the class. They also indicated to her that Bernard would only be eligible for the class for a short period of time because when he turned three, he would be eligible for a preschool program. At the suggestion of the Coventry psychologist and nurse, as well as Program Specialists Joe Pacheco and Cathi Serpa, Mrs. [ ] observed a class for autistic children at McKinnon. On her visit she observed eight children, one teacher, one full-time aide, and one part-time aide. Her impression was that the children at McKinnon were different from Bernard. She stated that they did not speak and exhibited stereotypical autistic behavior. She also noted that they were learning sign language. Mrs. [ ] visited an ECE class at Sherman Oaks on the suggestion of the Coventry nurse. Mrs. [ ] stated that the children in the class she observed were mentally retarded and she felt that it was not an appropriate peer group for Bernard.

Mrs. [ ] testified that Bernard was ultimately placed at Coventry in a preschool class for the visually impaired. She stated that there were eight to nine students in the class, one teacher, and a visually impaired aide. Mrs. [ ] stated that although the District initially refused to provide a one-to-one aide for Bernard, an aide was provided when Bernard actually began class. Mrs. [ ] described the other children in the class as bright and well-behaved. She

stated that Bernard exhibited behavior problems in the class, that he "did his own thing," and that he avoided and rarely interacted with the other children in the class. Mrs. [ ] testified that Bernard rarely participated willingly in any tasks unless he was very interested in the activity. She stated that he would pay some attention to activities involving the alphabet and numbers, which she indicated Bernard knew prior to entering the Coventry class.

Mrs. [ ] stated that in order to get Bernard to participate in any other classroom activities, including circle time and snack, it was necessary for an adult to physically hold him down. She stated that this was procedure was timed. Bernard was initially restrained for 20 seconds and then was allowed to go his own way. Mrs. [ ] believed that Bernard did not exhibit any growth while in the coventry class. She stated that he only showed a willingness to comply at circle and snack time because he knew if he did not the consequences were physical restraint.

Regarding Dr. Siegel's assessment, Mrs. [ ] testified that Ms. Milligan, District School Psychologist, gave her Dr. Siegel's name and recommended that she take Bernard to Dr. Siegel for an assessment. Mrs. [ ] stated that this referral was made in a manner similar to the way in which Ms. Milligan referred Bernard for a hearing assessment. (Dr. [ ] testified that Ms. Milligan told him that she would rely on the assessment of Dr. Siegel to assist in making a placement decision regarding Bernard.) Mrs. [ ] testified that she brought only the last page of Dr. Siegel's report (Exhibit 23) to the June IEP meeting because she felt there were things in the report that would be harmful for Bernard. For example, she thought Bernard would not be allowed to participate in the Carlton

program with a diagnosis of mental retardation. She also indicated that she felt the last page offered placement suggestions.

Mrs. [ ] testified that the district informed her that Bernard could not return to the Coventry program in the fall. She then observed a number of different program including the Severely Handicapped (SH) and Communicatively Handicapped (CH) classes at Carlton. Mrs. [ ] recalled that either Mr. Pacheco or Ms. Serpa told her that Bernard would not be able to function in the CH class because the children were "normal." Mrs. [ ] stated that she observed social interaction among the children in the class and also indicated that they acknowledged the teacher, tasks she indicated that Bernard would not be able to do.

Mrs. [ ] testified that since July 1, 1989, she has rented on a month-to-month basis, a two-bedroom apartment for $895 plus utilities of approximately $100 per month. She stated that the apartment is located about 20 minutes from the UCLA campus on which the Clinic is located. She travels with Bernard and his sister two times each month by airplane between Los Angeles and their home in San Jose. She stated that she must buy a ticket for Bernard and that the roundtrip airfare is between $150 and $250 per person.

Mrs. [ ] testified that Bernard receives 40 hours per week of intensive one-to-one treatment at the Clinic. Behavior modification techniques are used and that the sessions stress development of language, self-help, and socialization skills. Bernard participates in a preschool program as part of his treatment. Mrs. [ ] indicated that an important component of the program is parent training. Her twice weekly training at the Clinic is partially funded by the North Los Angeles Regional Center in the

amount of $467.84. She indicated that she works one-to-one with Bernard on his learning drills and participates in weekly goal setting with the Clinic staff. Mrs. [ ] stated that Bernard requires a 12-month program because of the possibility for regression, a dramatic instance of which occurred during the Christmas break.

Mrs. [ ] testified that since his enrollment at the Clinic, Bernard is more aware of his environment, uses language appropriately, and speaks in full sentences. She also indicated that Bernard now has less difficulty transitioning from one activity to another and is beginning to imitate, as well as play with, his younger sister. Mrs. [ ] stated that she has observed more transfer of learning in Bernard in the last few weeks. Dr. [ ] also testified that he has observed improvements in Bernard's behavior as well as academic skills since he has participated in the Clinic's program.

Bryna Siegel

Bryna Siegel, Ph.D., Assistant Adjunct Professor of Psychology, University of California, San Francisco, testified at the request of Dr. and Mrs. [ ]. She stated that she has conducted assessments of approximately 600 children with suspected developmental disorders or autistic-like characteristics. Each assessment includes approximately six hours of observations of the child in various situations, family history, and completion by the child's parents of the Stanford Assessment Battery. Dr. Siegel testified that she developed this tool to assist her to obtain information that may provide developmental indicators of autism. Dr. Siegel testified that Bernard met the criteria for a diagnosis of autism.

Dr. Siegel stated that she saw Bernard at his home for a reevaluation on December 8, 1989 and again on Janu-

ary 18, 1990, at the Clinic. She described Bernard's achievement as "marked," and stated that she was impressed by his academic compliance. She observed that Bernard was able to transition from a drill to an activity and was able to select an activity in which to participate. Bernard also demonstrated the ability to generalize what he has learned. Dr. Siegel also observed Bernard at the preschool he was attending. She stated that Bernard was not ready to participate in a group setting and that the teacher was not knowledgeable regarding autism. She stated that Bernard cannot yet model peer behavior and recommended initially introducing one peer into his environment.

Dr. Siegel recommended an intensive intervention program and indicated that early intervention enhances the possibility of successful remediation of autism. Dr. Siegel testified that an appropriate program for Bernard includes one-to-one instruction by staff trained to work with autistic children. She stated that this is an important component because an autistic child is unable to learn from imitating and is not reinforced by the peer group. She also recommended an environment free from alternate forms of stimulation so that Bernard can focus on relevant stimuli. Dr. Siegel also suggested that it is best for Bernard to work with a limited number of people who utilize consistent methods as well as language appropriate for Bernard's developmental level. Dr. Siegel testified that parent training is an important component of any program for autistic children because autistic children have poor generalizing skills and need their parents to provide consistency. Dr. Siegel testified that Bernard needs a 12-month educational program to reinforce the skills he is learning until they are self-maintained. She also stated that he needs to maintain the intensive one-to-

one work through August 1990. After that, she recommended slowly transitioning Bernard to a group setting in September.

Dr. Siegel described the Clinic program in which Bernard is currently participating as "highly appropriate" for Bernard. She indicated that she was not familiar with any another program that would be able to bring about similar gains for Bernard.

Dr. Siegel stated that she was not familiar with the District program at Carlton, but from the description of the program in Exhibit 75, she did not feel that the program would provide enough structure for Bernard. She also testified that Bernard's IEP as written does not indicate a level of structure sufficient to meet what is required by Bernard.

Diane Kirchner

Diane Kirchner, Ph.D., was called as an expert witness by the [ ]s. She is in private practice as a speech and language specialist. She indicated that she conducts evaluations and provides therapeutic and consulting services to individuals as well as public schools. She stated that the bulk of her practice is with persons with severe language disorders, including autistic or autistic-like children.

Dr. Kirchner testified that she reviewed previous assessments of Bernard, his IEPs, other documentation, and viewed the videotape of Bernard at the Clinic prior to assessing Bernard in his home on December 19 and 28, 1989. Dr. Kirchner noted that Bernard has made significant gains in language and social behavior since attending the Clinic and attributed these gains to the Clinic program. She felt that despite Bernard's severe behavior and language delays, his responsiveness indicates a good prog-

nosis for cognitive growth if he receives proper intervention during the preschool years. She testified that his current goals and objectives are appropriate and stated that they can only be met at the Clinic in which Bernard is currently enrolled. She indicated that Bernard's attending and compliance skills are fragile and that if he does not remain at the Clinic throughout the summer of 1990, he will not be ready for fall placement in a District CH class. She also felt that Bernard needs to attend a year-round program so that he will not regress as he did this year over the winter break.

Dr. Kirchner observed the District's proposed placement at Carlton for approximately three hours. She indicated that it was an excellent class, had a well-qualified teacher, and that it was an enriched environment. However, she testified that it would not be an appropriate placement for Bernard. She observed a small group art activity where the ratio of children to teacher was three to one. She also observed circle time. She felt that Bernard cannot benefit from either small or large group instruction and stated that Bernard would be overstimulated by the environment of the Carlton classroom. Dr. Kirchner testified that Bernard is just beginning to learn the behaviors that are necessary to be able to participate in the Carlton class and stated that Bernard does not have the requisite attention span, ability to sit, nor does he have the ability to process language sufficiently to benefit from placement at Carlton at any time during the 1989-90 school year.

Dr. Kirchner described the gains noted on Bernard's IEP of June 1989, from the previous IEP as "negligible" and testified that an increased attention span from two to five seconds would not have assisted Bernard in the Carlton class.

Tristam Smith

Tristam Smith, Assistant Director of the Clinic for Behavioral Treatment of Autistic Children, testified on behalf of the [ ]s. He is a Ph.D. candidate and has received training in clinical psychology at the University of California, Los Angeles. Mr. Smith presented documents to indicate that the Clinic obtained certification as a nonpublic agency effective from September 12, 1989 through June 30, 1990, and is authorized to provide counseling services. Mr. Smith testified that school districts have on occasion funded participation in the Clinic's program and testified that at least one of those was a district in California. The Descriptive Statement of the Clinic, which is a part of the application for certification, indicates that the Clinic serves developmentally disabled children under six years of age . . . who are mildly or moderately mentally retarded," and provides "one-to-one instruction, with a behavioral emphasis, aimed at enhancing children's overall functioning so that they are better able to function in public schools." (Joint Exhibit I) The same exhibit indicates, and Mr. Smith testified similarly, that the treatment program is delivered in part by students at the University of California, Los Angeles. The B.A., M.A., and Ph.D. candidates are supervised both directly and in consultation with Dr. Ivar Lovaas, Licensed Psychologist and Clinic Director.

Mr. Smith currently oversees the treatment team working with Bernard at the Clinic. Mr. Smith indicated that he met Bernard for the first time on June 1, 1989, when the family came to the Clinic for an intake interview. Mr. Smith testified that the assessments of Bernard on that date resulted in a diagnosis of autism. He stated that Bernard met the criteria for acceptance into the Clinic based on projections that Bernard would benefit rapidly

from the Clinic's program and because Bernard's family was intact enough to be able to handle the periods of separation during Bernard's participation in the program in Los Angeles.

Mr. Smith indicated that Bernard began a three-month trial period at the Clinic to monitor his progress. Mr. Smith testified that Bernard's treatment first addressed compliance. The team then began what Mr. Smith described as a "broad-based intervention program" to reach Bernard skills required to facilitate the acquisition of other skills. Those skills include modeling and imitation. He stated that the Clinic staff meets on a weekly basis to reformulate Bernard's program and indicated that the senior therapist prepares a summary of Bernard's progress. Mr. Smith testified that one of the Clinic's goals is to provide parent training so that the child's parents will ultimately be able to take over the treatment program for their child.

Mr. Smith testified that Bernard receives one-to-one instruction, that his lessons are delivered in a discrete-trial format, and that instruction is broken down into the smallest learning units possible. If Bernard responds within three seconds, he receives a primary reinforcer—food or drink, paired with social approval—praise and physical touching. Mr. Smith testified that a long-term study of participants in the Clinic found that all but one child had passed to first grade programs either regular or special education class rather than institutionalization. Mr. Smith also indicated that Exhibit 81 discusses the results of the effectiveness of the Clinic's intensive behavioral intervention program. That article reports that 47 percent of the group receiving treatment achieved normal intellectual and educational function, compared to 2 percent of the control group; 40 percent were mildly re-

tarded and participated in Special Education communicatively handicapped classes, compared to 45 percent of the control group; and 10 percent were profoundly retarded and placed in classes for the autistic/retarded, compared to 53 percent of the control group.

Mr. Smith testified that Bernard's June 1989 IEP goals were implemented at the Clinic. He indicated that Bernard had met or surpassed these goals, with the exception of being able to sit in a circle. Mr. Smith testified that Bernard made progress in July in the areas of labeling, abstract relationships, compliance, matching, and imitating. Bernard also expanded his recognition of colors and shapes. Mr. Smith also indicated that Bernard's program was changed to include skills necessary for integration into a classroom setting. (ie. toilet training) Mr. Smith reported that in August Bernard increased abstract language and social skills. (Exhibit 50) He reported that in late August/early September, Bernard's program increased pre-academic and language activities. (Exhibit 60) Mr. Smith summarized Bernard's progress in October 1989, stating that he continued to work on abstract language, pre-academic skills, and prepositions. He indicated that Bernard is starting to string sentences together on his own and identifies questions. (Exhibits 62 & 63) Mr. Smith testified that after the holiday break in December, Bernard exhibited inappropriate behaviors, including yelling and noncompliance. He stated that although he had not expected Bernard to regress, he was not surprised that he had.

Mr. Smith testified that he anticipates that Bernard will continue to require an intensive 40-hour-per-week program through August of 1990. He stated that Bernard continues to need assistance with acquiring socialization skills and that he has difficulty making friends, initiating

conversations, and sitting in a circle. Bernard also requires one-to-one assistance from his therapist in order to attend preschool. He recommended one-to-one assistance from a Clinic staff person to assist with transitioning Bernard into a public school program. He stated that this person would assist with training a classroom aide, update parent training, and provide consultation on a monthly basis at the beginning of the school year.

Mr. Smith attended the September 1989 IEP meetings. He testified that the goals and objectives identified on that IEP continue to be appropriate. He also testified that the typewritten list (Exhibit 59) identifies Bernard's program needs.

Ernest Wing

Ernest Wing, Educational Consultant, was present at Bernard's IEP meetings in September 1989 at the request of the [ ]s. Mr. Wing testified that Bernard's previous IEPs of April 3, 1989 and June 6, 1989, did not provide an adequate program description in order to facilitate an appropriate placement for Bernard. Mr. Wing stated that all team members of the September IEP meeting agreed with the description of Bernard's present level of functioning as well as with the goals and objectives as stated. According to Mr. Wing, it was the intent of the IEP team to develop annual goals and objectives. He indicated that agreement was not reached regarding the components of an appropriate educational program and required related services. Mr. Wing stated that Ms. Serpa typed on the IEP only those items which the District was willing to provide and stated that the handwritten notes on Exhibit 59 were made by him to indicate the differences between what the District was recommending and what Bernard's parents requested.

Mr. Wing testified that a specific placement site was not offered at the IEP meeting. He left the IEP meeting of September 29, 1989, with the understanding that Program Specialists Pacheco and Serpa were to observe at potential sites and that the [ ]s would then be contacted to also make observations. According to Mr. Wing, when he spoke with Mrs. [ ] one month later, the District had not yet contacted her.

Regarding Nonpublic Agencies (NPA), Mr. Wing stated that it was his understanding that an NPA is certified to provide Special Education related services and that the Clinic has a counseling certification. Mr. Wing felt that Bernard's IEP could be implemented at the Clinic and testified that he knew of at least one other IEP that was implemented by an NPA.

Joan Bowen

The District first called witnesses who had assessed Bernard. Joan Bowen, District Speech and Language Specialist, described Bernard as noncompliant and nonresponsive to her requests when she attempted to assess him on two occasions in the Spring of 1989. She testified that Bernard did not use or respond to language. Ms. Bowen assessed Bernard again in September 1989 and described him as "testable" on that date. Ms. Bowen indicated that she was impressed by the remarkable social progress and improvement in language since Bernard's enrollment in the Clinic.

Ms. Bowen participated in the September 1989 IEP meetings. She testified that several placement sites were offered by the District at that time and later stated that it was her impression that the Program Specialists were asked to locate sites at which Bernard's IEP could be implemented. Ms. Bowen testified she was familiar with

the District's proposed placement at Carlton. She indicated that although the class was not appropriate in April of 1989 because Bernard had not yet met the goal of "attending," she felt that Carlton would now meet the placement criteria on Bernard's current IEP.

Barbara Milligan

Barbara Milligan, School Psychologist for the past 20 years, testified that she had previously assessed one autistic child. She indicated that she was able to complete a portion of the Bernard's assessment on each of two occasions. She stated that Bernard was focused for approximately 15 minutes, after which he became interested in a typewriter. She stated that during that period, Bernard actively participated in the peg task of the Merrill-Palmer. She also indicated that Bernard resisted focusing on any of the assessment tasks during the second assessment session at the [ ] home.

Regarding the assessment of Bernard by Dr. Siegel, Ms. Milligan testified that she did not refer the [ ]s to Dr. Siegel but did provide them with Dr. Siegel's phone number. She also stated that she did not agree with Dr. Sieggel's assessment of Bernard as moderately retarded. Ms. Milligan does not interpret Bernard's scores to mean that he is unable to do the tasks measured by the assessment. They indicate instead that, because of his oppositional behavior in the testing situation, he simply did not do the required tasks. The fact that Bernard scored well on the peg task indicated to Ms. Milligan that he has the potential to develop academic skills. She was also hesitant to label Bernard as autistic because of young age and because he did not meet the typical criteria of an autistic child. She testified that Bernard responded to her and did not withdraw from her. She also did not notice any perceverative behavior in Bernard. Ms. Milligan believed Ber-

nard should be observed in a structured educational environment prior to making a diagnosis of his condition.

In late May Ms. Milligan made a one-half hour observation of Bernard in the Coventry class. She stated that she observed Bernard working one-to-one with the classroom aide. Ms. Milligan testified that Bernard made some growth while in the class, particularly in attending. She believed that Bernard would have continued to make progress if he had remained in the class.

Joe Pacheco

Joe Pacheco, Program Specialist, SELPA III, assisted with the May 1989 multi-disciplinary assessment of Bernard. He described Bernard as impulsive and oppositional. He testified that he had difficulty getting Bernard to focus and to perform on a standardized test. Mr. Pacheco stated that he believed at the time of the assessment that Bernard's needs were more severe than speech development or articulation. Although he did not think that Bernard had a hearing loss, Mr. Pacheco stated that he recommended that Bernard's hearing be checked. He testified that Dr. [ ] raised the issue of "autism" and requested suggestions on where he could obtain information. Mr. Pacheco testified that he did not refer the [ ] to Bryna Siegel, but did provide them with a list of resources that included Dr. Siegel and the Clinic. He testified that the reference to Dr. Siegel on Ms. Milligan's report was done as a courtesy to her.

Mr. Pacheco indicated that the goals and objectives of Bernard's IEP of March 1989, and his subsequent placement at Coventry, were designed to help Bernard develop pre-linguistic skills of attending and focusing. Mr. Pacheco believed that Bernard would not benefit from formal speech and language services until attaining those skills.

Mr. Pacheco observed Bernard five or six times at Coventry during the late spring of 1989 and testified that Bernard made progress in the class, that he had increased eye contact, and made some attempt to interact with the other children.

Mr. Pacheco indicated that after the IEP of June 1989, he did not need to follow-up with placement of Bernard because he understood that the [ ] were immediately going to Los Angeles. He stated that the CH class at Carlton would have been an appropriate placement in June of 1989, but that "it would have taken some work." Mr. Pacheco stated that he was not asked to look for placement sites after the September IEP because the [ ] had not given their approval to implement the IEP.

After reviewing Exhibit 73, notes dated 1/10 from the Clinic addressing Bernard's activities, Mr. Pacheco concluded that Bernard had made very little progress since entering the Clinic program. He stated that the profile of Bernard presented there indicates that he continues to exhibit many inappropriate behaviors, has a short attention span, is not compliant, throws tantrums, is aloof, has poor eye contact, and has difficulty making transitions.

Mr. Pacheco testified that Bernard is a bright child who tends to be manipulative. He stated that Bernard is able to exclude extraneous stimuli and can focus if he wants to. Mr. Pacheco was of the opinion that a one-to-one learning situation would not be beneficial for Bernard, to both model and interact with other children. He also stated that one-to-one instruction increases the potential for dependency. Mr. Pacheco concluded that Bernard is capable of learning in a group setting and would benefit from placement in a communicatively handicapped class. He recommended a CH class rather than the a

class for autistic children because he believes that Bernard is less like a severely autistic child and has needs that are similar to communicatively handicapped children.

Mr. Pacheco indicted that he is familiar with the communicatively handicapped preschool class at Carlton Elementary School. He stated that the class is approximately four hours long and has a small student-to-teacher ratio. He testified that the focus of the class is on the development of language and pre-academic skills. He stated that the teacher has set up a behavior modification program and that there is individual instruction determined by the needs of the individual child. Mr. Pacheco also indicated that he is familiar with the students in the class because he had assessed some of them and had observed others in the infant class. He stated that the students' IEP goals and objectives are similar to Bernard's, although there are no children with the subclassification of autism in the class. He stated that Bernard and the students have similar cognitive abilities and that the children in the class have communication skills that are both higher and lower than Bernard's. Mr. Pacheco disagreed with Dr. Kirchner's description of the students' language levels and stated that they would not be in that class if they were functioning at language Levels 3 or 4. Mr. Pacheco further stated that children benefit from exposure to higher levels of language in order to develop their own language skills. He believes that when Bernard is focused and listening, he is able to comprehend higher than level 1. Mr. Pacheco stated that the Carlton teacher maintains good contact with the students' parents through notebooks, phone calls, conferences, workshops, and home visits. He stated that she also informs parents of the activities and concepts taught in the class so that they are able to reinforce them at home.

Mr. Pacheco indicated that he was not familiar with the proposed Severely Handicapped class at McKinnon School.

Mr. Pacheco indicated that he was acquainted with the Clinic through literature and conversations with the therapists, and that he had a nephew who was enrolled there. Mr. Pacheco testified that he objects to the intrusiveness of the program and the types of interactions between the students and the therapists. He also questioned the long-lasting effects of the program. Based on his perception of the Clinic and his familiarity with Bernard, Mr. Pacheco concluded that Bernard does not require the Clinic's program in order to benefit from Special Education.

Cathi Serpa

Cathi Serpa is a Program Specialist employed by the Santa Clara County Office of Education, SELPA II. For the previous three years she was Program Specialist for SELPA III, which includes the Union District. Ms. Selpa participated in the assessment of Bernard during the Spring of 1989, has made several visits to the [ ] home, and has provided them with information through numerous telephone conversations.

Ms. Serpa testified that Dr. Siegel was mentioned by Joe Pacheco in discussion with the [ ]s early in March 1989. She stated that she did not refer the [ ]s to Dr. Siegel, but because the [ ]s appeared very concerned about obtaining a diagnosis of Bernard's problems, she told the [ ]s she would find out how to contact Dr. Siegel and did not discourage them from contacting her. Ms. Serpa also stated that the District has not used Dr. Siegel as part of their assessment team, although she is respected for her work with autistic children.

Ms. Serpa testified that the [ ]s did not voice any dissatisfaction with the goals and objectives developed at the IEP meeting of April 1989. Regarding the length of time that elapsed between the IEP meeting and Bernard's placement, Ms. Serpa testified that the referral first went to B. J. McCallum, SELPA administrator, and then to Joe Fimiani, who questioned why Bernard was being placed in an infant program when he would exceed the age guidelines in only three months. Ms. Serpa stated that Mr. Fimiani forwarded the referral to Barbara Ballard, Principal of Coventry School, who arranged for Mrs. [ ] to visit several infant classes into which Bernard potentially could be placed. It was Ms. Serpa's impression that Mrs. [ ] felt that Bernard was cognitively ahead of the children in these classes. Subsequently, Ms. Ballard and Mrs. [ ] visited the preschool class for visually impaired children. Ms. Serpa indicated that Mrs. [ ] reacted favorably to Bernard's placement there because the children were functioning at a cognitive level similar to Bernard's. Ms. Serpa testified that although Bernard was enrolled in a preschool class, he attended school three days per week on the infant schedule because he was categorized as an infant.

Ms. Serpa stated that she observed Bernard weekly during his placement at Coventry. On one occasion she observed Bernard sitting on the lap of an adult who was using a hand-over-hand technique to help Bernard participate in an activity. She testified that during the period Bernard attended Coventry, he was bonding with the adults in the classroom and had increased eye contact and increased time at snack and circle times. She also indicated that the [ ]s expressed satisfaction with the Coventry program. To her knowledge, Bernard did not receive speech and language services from the District.

Ms. Serpa testified that the IEP team of September 1989 accepted the Clinic's assessment and videotape of Bernard as accurate measurements of his abilities. The team did request additional speech and language testing, which the District completed shortly thereafter. Ms. Serpa testified that the IEP goals and objectives developed in September 1989 continue to be appropriate and could be implemented in the Carlton preschool CH class . . . . Ms. Serpa stated she considered other programs before recommending the Carlton class but felt that the McKinnon class and the Morgan Center were too restrictive for Bernard. Ms. Serpa stated that there are nine, three to five year old children with severe language disorders in Carlton CH class. The class is three hours each school day and is located on an integrated school campus. The classroom teacher, Elaine Anton-Giovanni, is a speech and language therapist trained in behavior intervention techniques and is assisted by two instructional aides. Ms. Serpa stated that, in addition to delayed communication, some of the children have attending, self-help, socialization or behavioral problems. Ms. Serpa testified that the profile of Bernard presented from the Clinic indicates that Bernard is developmentally similar to the children in the Carlton school class. She stated that Ms. Anton-Giovanni incorporates a perceptual-motor development program into the curriculum; the class has a computer lab and library; and speech and language therapy is provided on a pull-out basis by the speech and language therapist. Ms. Serpa stated that Bernard would receive one-to-one instruction in accordance with his IEP. Ms. Serpa disagreed with Dr. Kirchner's assessment of the level of language of the class. She stated that some students are at level 1 of language and indicated that their current IEPs contain goals as simple as pointing to pic-

tures. Ms. Serpa also testified that it is accepted educational policy for preschool and kindergarten classes not to exceed 3½ hours daily. She believed that a longer program would cause Bernard to become tired.

Ms. Serpa testified that McKinnon is an appropriate placement for autistic children. She did not recommend it as an appropriate placement for Bernard based on the fact that Bernard's primary areas of deficit are in language and attending. She stated that participation with other children in the CH class would provide Bernard with more appropriate models. Ms. Serpa stated that she believed that Bernard's behavior would improve after he has more experiences in a school environment. She believed the use of a behaviorist would also be appropriate.

Ms. Serpa testified that it is her understanding that the Clinic uses conditioning and aversives to obtain compliance from their clients. She stated that a behavior is targeted and then the child is rewarded if he/she responds appropriately or punished if he/she responds inappropriate.

Ginger Brown

Ginger Brown, Bernard's teacher at Coventry, testified that when Bernard entered her class in April he was resistent, had temper tantrums, loved activities involving letters and numbers, and liked to play with a little bus in the corner of the room by himself. She stated that her goals were for Bernard to learn to follow the school routine and to become less self-focused. Ms. Brown stated that while in her class Bernard had voluntarily participated in only one activity, which involved a parachute. she testified that Bernard would not perform other tasks without one-to-one assistance. She stated that Bernard learned and progressed during the short time he was in

her class. Regarding speech and language services, Ms. Brown testified that she did not feel that she needed to consult with a speech and language therapist because she was meeting Bernard's speech needs.

James Stonehouse

James Stonehouse, District School Psychologist, testified that he observed Bernard while Bernard was in the Coventry class and that he participated in the June and September 1989 IEP meetings. He indicated that he offered Mrs. [ ] parent training and was willing to discuss Bernard's behavior with her. He testified that the placement was not inappropriate for Bernard because it exposed him to social situations involving other children and adults.

Lyle Chambers

Lyle Chambers, Director of Special Services, stated that he has been a Special Education Administrator for 30 years. He testified that a child's residence for school purposes is determined by where the child resides during the school week. He indicated that Bernard was not provided with speech and language therapy while attending Coventry because the therapist was ill. He indicated that to his knowledge no one was assigned to replace the therapist, but indicated that it was the County's responsibility because the program was operated by the County. Mr. Chambers testified that he did not respond to Dr. Smith's requests during the summer of 1989 because the District is not required to conduct assessments during July and August. It was his understanding that he had 30 days from the first of September in which to hold an IEP meeting as requested by Dr. [ ]. Mr. Chambers also testified that he understood that Bernard was returning to the

District, that the September IEP meetings were held in preparation for his return, and that the District is waiting for the [ ] to return to see the proposed Carlton placement.

LEGAL ANALYSIS

DOES BERNARD RESIDE WITHIN THE JURISDICTIONAL BOUNDARIES OF THE DISTRICT?

The District contends that it is not required to provide an educational placement for Bernard because he is not a resident of the District. The District asserts that Bernard is a resident of Los Angeles because he eats and sleeps there during the school week.

It is undisputed that Bernard, the son of Dr. and Mrs. [ ], qualifies for Special Education services under state and federal Special Education law. The [ ] family established their home in San Jose, California, within the boundaries of the District. They purchased their home there, Dr. [ ] has a medical practice nearby, votes, and pays taxes in San Jose. The [ ]s have declared that San Jose is their permanent residence.

Mrs. [ ] established temporary residence in Thousand Oaks, California, during the school week solely for the purpose of Bernard attending the Clinic for a 40-hour-per week intensive program in which parent participation is an integral component. Subsequent to Bernard's enrollment at the Clinic, Mrs. [ ], Bernard, and his sister have returned to the family's San Jose residence for weekends and holidays.

The [ ]s have neither divorced nor separated. Their place of residence has not changed by the fact that Mrs.

[ ], Bernard, and his sister temporarily are in Los Angeles in order for Bernard to attend the Clinic's program. Furthermore, the District has acknowledged its responsibility for the education of Bernard, which is evidenced by the fact that it conducted IEP meetings in regard to Bernard in September of 1989, subsequent to his enrollment in the Clinic.

The evidence establishes that the [ ]s reside within the jurisdictional boundaries of the Union Elementary School District, which is therefore responsible for the education of Bernard.[2]

SHOULD BERNARD'S IEP OF SEPTEMBER 1989 BE AMENDED TO INCLUDE CERTAIN PARAMETERS OF PLACEMENT?

The [ ]s assert that the typewritten portion of Exhibit 59 lists the parameters of placement that define an appropriate educational placement for Bernard. They assert that the placement recommendation in Bernard's IEP of September 1989 is not appropriate insomuch as the parameters differ from those proposed by the [ ]s. The [ ]s assert that Bernard's IEP of September 1989 must be amended to include the items specified below in order to define an appropriate educational placement for Bernard for the 1989-90 school year.

Forty-hour Educational Program

The [ ]s assert that Bernard requires a 40-hour-per-week educational program; Bernard's IEP of September 1989 indicates a 17.5-hour-per-week educational program.

Testimony regarding Bernard's ability to benefit from a program of the length proposed by the [ ]s was contradictory. Those witnesses who have worked extensively

with autistic children (Mr. Smith, Dr. Siegel, and Dr. Kirchner) testified to Bernard's need for a program of the intensity proposed by his parents. District witnesses Serpa and Pacheco expressed concern that a program of the length proposed by the [ ]s would be harmful for Bernard, asserting that it would require too much from a child of his age.

California Education Code Section 56441.3(b) states "The duration of *group* services [for children between three and five years of age] shall not exceed four hours per day unless determined otherwise by the IEP team." (emphasis added) Bernard does not currently participate in group services at the Clinic for a period that exceeds state limits, nor would he if the forty-hour educational program proposed by the [ ]s were implemented. With the exception of his participation in a preschool program once per week. Bernard's educational program at the Clinic is comprised of one-to-one sessions with the Clinic therapists.

The Hearing Officer concludes on the basis of testimony by the experts in autism and on the basis of the benefit Bernard is currently deriving from his intensive participation in the Clinic program that Bernard requires a 40-hour-per-week program.

Full-time One-to-one Aide

The [ ]s assert that Bernard requires the assistance of a full-time, one-to-one individual extensively trained in behavioral intervention techniques. Bernard's IEP of September 1989 indicates that Bernard will receive both individual- and small-group instruction. The IEP also states that daily one-to-one instruction will occur but does not indicate the frequency with which this will occur.

District witnesses testified regarding the difficulty they had encountered when assessing Bernard and, in fact achieved minimal success even with two people working together with Bernard. Mrs. [ ] testified that direct adult supervision was necessary to obtain compliance from Bernard during the period he attended Coventry School.

Expert witnesses Siegel, Kirchner, and Smith testified that Bernard requires full-time, one-to-one assistance in order to benefit at all from an educational program. After a recent observation of Bernard at the Clinic and in the preschool he currently attends as part of his treatment program at the Clinic, Dr. Siegel concluded that Bernard was not ready to participate in a group setting. Dr. Kirchner also felt that Bernard would not be able to benefit from either small- or large-group instruction and testified that Bernard would not be able to function in any group learning situation absent one-to-one assistance. Mr. Smith testified that Bernard has not yet achieved success at integrating with his peers.

Although the only time Mr. Pacheco had seen Bernard since June 1989 was on the videotape provided by the [ ]s, he disputed Bernard's need for a one-to-one aide and felt that a full-time aide could foster dependency on that person.

The fact that Bernard has progressed was not disputed. Dr. Siegel's testimony, as well as the testimony of Dr. Kirchner and Mr. [ ], which was based on current observations of Bernard, indicates that Bernard currently requires one-to-one assistance. It is reasonable to also conclude that Bernard required one-to-one assistance at the time his IEP was developed in September of 1989.

Dr. Siegel testified that autistic children do not learn in the same manner as other children because they are not

able to imitate their peers and have difficulty generalizing what they do learn in differing environments. She indicated that this applies to Bernard and concluded that the person working with Bernard must be trained to work with autistic children.

Based on Bernard's current achievements in a one-to-one intervention setting and the persuasive testimony of those witnesses who have expertise in autism and who had observed Bernard most recently, the hearing officer concludes that Bernard requires full-time, one-to-one assistance throughout his program.

Daily Integration into Regular Preschool

The [ ]s request that Bernard's IEP be amended to indicate daily integration into a regular education preschool classroom. Bernard's IEP of September 1989 indicates that he shall have the opportunity for daily integration; therefore, it is not necessary to make the requested amendment regarding daily integration to Bernard's IEP.

Behavior Intervention Program

The [ ]s assert that Bernard requires a behavioral intervention program supervised by a licensed, credentialed psychologist who is a specialist in behavioral intervention with preschool-aged autistic children. Bernard's IEP currently indicates that the behavioral intervention program will be designed and supervised by "a licensed credential psychologist *or other specialist who is knowledgeable* in the area of behavioral interventions with preschool and autistic children." (emphasis added). Testimony of the experts who work with autistic children on a regular basis all recommended that the individual responsible for providing the intervention program for Bernard be trained to work with autistic children. They

did not qualify that recommendation by suggesting that only a psychologist could provide those services. The evidence is not persuasive that it is necessary to have Bernard's behavior intervention program supervised by a psychologist.

Parent Training

The [ ]s assert that five hours per week of parent training is a required component of Bernard's educational program. The District has offered parent consultation two times weekly for 30-45 minute sessions. California Education Code Sections pertaining to education services for preschool children emphasize the important role parents play in the early education program of their young children. Section 56441.3(a)(3) states that programs shall include "interacting and consulting with the family members . . . to demonstrate developmentally appropriate activities necessary to implement the child's individualized education program . . . and to reinforce the expansion of his or her skills in order to promote the child's educational developmeht."

Dr. Siegel noted that autistic children have a difficult time generalizing and emphasized the importance of a parent training component in the overall effectiveness of the child's program. She testified that the child's program must be consistently reinforced in other than the school environment. Mr. [ ] also felt that parent training was critical to enable Bernard's parents to continue his treatment program. Both Dr. Siegel and Mr. [ ] were in agreement that the amount of time for parent training requested by the [ ]s was required to provide Mrs. [ ] with the ability to consistently and effectively carry out Bernard's intervention program in home and community environments. Bernard's IEP of September 1989

shall therefore be amended to increase the amount of parent training to five hours per week.

Direct Intervention in Home, School, and Community

The [ ]s assert that Bernard's behavioral intervention must occur in all of Bernard's environments, including home, school, and community. Bernard's IEP of September 1989, already includes the opportunity to generalize skills in *community* settings.

California Education codes addressing education services for preschool children indicate that home and school are appropriate environments in which to implement a preschool-aged child's IEP. Parent training is included in Bernard's educational plan. As discussed above, testimony established the importance of continuity in Bernard's treatment. It would be beneficial for the parent training component of Bernard's IEP to occur in his home to reinforce the behavioral intervention program in other than the school environment and also to enable the person providing the training to observe the parent and child interacting in the home environment. Drs. Siegel and Kirchner, as well as Mr. Smith testified that this component was a required parameter to define Bernard's educational needs.

The hearing officer determines that Bernard's IEP of September 1989 shall be amended to indicate that at least one-half of the parent training shall occur in Bernard's home.

SHOULD BERNARD'S CURRENT IEP BE EXTENDED THROUGH AUGUST 31, 1990?

The [ ]s have requested that Bernard's IEP of September 1989 be extended through August 31, 1990, asserting that it reflects his current educational needs and that

the goals and objectives identified therein remain appropriate. Under federal law, and IEP must contain a statement of the child's present levels of educational performance and a statement of annual goals, including short term instructional objectives. (34 C.F.R. Section 300. 346) Bernard's IEP written in September of 1989 was based on assessment data from September of 1989 and contains a number of goals and objectives in the areas of communication, self-help, socialization, and preacademic areas. The IEP was scheduled for review in January of 1990. Mr. Wing testified, however, that the IEP team of September 1989 developed annual goals and objectives.

The statement in the IEP of September 1989 of Bernard's level of educational performance generally reflects the level at which he is currently functioning. Mr. Smith indicated that the goals and objectives of the IEP of September 1989 were currently being implemented at the Clinic and continue to be appropriate. Drs. Kirchner and Siegel, the [ ]s, and District witness Ms. Serpa concurred. With the exception of testimony by District witnesses disputing the parents' proposed parameters of placement, there was no strenuous objection to extending Bernard's IEP and no evidence was presented to indicate that Bernard's needs had changed. Therefore, the goals and objectives of Bernard's current IEP shall be extended through August 31, 1990. The amendments to the parameters of placement in Bernard's IEP of September 1989, as determined above, shall also be included in the extended IEP.

HAS THE DISTRICT PROVIDED AN APPROPRIATE EDUCATIONAL PLACEMENT FOR BERNARD?

Under the Education for Handicapped Act (EHA) and state law, handicapped children are guaranteed the right to a free appropriate public education. The United States

Supreme Court defined the meaning of "appropriate" in *Board of Education v. Rowley,* (1982) 458 U.S. 175. In reaching its decision in that case, the Court looked to both the language of the statute and its legislative history and concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." (458 U.S. 175, 200)[3] The *Rowley* Court determined that a measure of benefit for a handicapped child in regular education is whether the child is receiving passing marks and is advancing from grade to grade. (458 U.S. at 204) The *Rowley* Court also recognized the inherent difficulty in applying this standard and stated, "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." (458 U.S. at 202) The Court of Appeals, 3rd Circuit, in *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171 (1988), attempted to give further meaning to the *Rowley* standard of appropriate and concluded that the Act calls for "meaningful" benefit. (853 F.2d at 184)

All protections and rights of Special Education law apply to children between the ages of three to five years old. California Education Code Sections 56440 through 56449 specifically address Special Education requirements for individuals with exceptional needs that fall in that age group. Section 56440(d) indicates that specially designed services to meet the unique needs of the child and his/her family shall be provided to all children between three and five years old requiring intensive special education and services. (Education Code Section 56441.2) The focus of an early educa-

tion program is "on the young child and his or her family . . . and shall include opportunities for active parent involvement," including interacting and consulting with family members, parent counseling and training to help parents understand the special needs of the children. (Section 56441.3(a))

Specific educational placement is defined in 5 CCR Section 3042(a) as "That unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the individualized education program, in any one or a combination of public, private, home and hospital or residential settings." Services to children ages three through five may be provided to an individual child or small groups, in a variety of environments including the child's home, public or private school, and may be arranged through a contract with a certified nonpublic school or agency. (Sections 56441.3 through 56441.8)

The primary issue in this hearing is regarding the appropriate placement for Bernard. Therefore, it is first necessary to determine whether the District has provided an educational placement which is that combination of facilities, personnel, location, and equipment that will enable Bernard to benefit educationally.

Was Bernard's placement at Coventry appropriate?

Bernard's initial IEP in April of 1989 indicated placement in an Early Education Severely Handicapped class for a weekly total of 180 minutes. Bernard was placed in a preschool class for the Visually Impaired at Coventry School, which he attended for approximately three weeks. The District has stated that this placement was

for diagnostic purposes and to accommodate the wishes of Mrs. [ ], who was not pleased with any of the other proposed District placements.

Bernard was at the Coventry site for such a short period of time that it is difficult to ascertain whether Bernard benefitted from that placement. The District asserts that Bernard made remarkable progress during his placement there, citing as examples Bernard's increased attention span, bonding with the adults in the class, increased eye contact, behavioral changes, some peer interaction, and increased participation at snack and circle activities. (Testimony of Mr. Pacheco, Ms. Serpa, and Ms. Milligan) Mrs. [ ] disputed the District's assertions. She contended that increased eye contact from 2 to 5 seconds, for example, is negligible. Mrs. [ ] testified that the only activities Bernard showed any interest in at Coventry were those involving numbers and letters. Bernard knew and could recite these before entering the Coventry class. Mrs. [ ] acknowledged that Bernard complied briefly at circle and snack times, but only because he was aware of the consequences of physical restraint if he did not. She also stated that he participated on one occasion in an activitiy involving a parachute.

Although Bernard was determined eligible for Special Education on the basis of language deficits, his IEP of April 1989 required speech and language services only "as appropriate." Bernard did not receive any speech and language services from the District during the period he attended Coventry or anytime thereafter. The District's explanation for this was that he did not need any services while attending Coventry, that the therapist was unavailable due to illness, or that the County was responsible – not the District – for providing the

services to Bernard. (Testimony of Mr. Chambers and Ms. Brown)

The evidence establishes that Bernard required intensive Special Education services to remediate serious language, behavior, social, and attending deficiencies. The District instead provided him with minimal services in a class for visually impaired for a total of 180 minutes per week. Bernard's needs were not similar to the needs of the other children in the class – Bernard had behavioral, social, attending, speech, and language deficits, while the other children in the class were visually impaired and described by Mrs. [ ] has "bright and well-behaved." Bernard did not receive the required speech and language services. Therefore, the District did not provide Bernard with specialized instruction and related services individually designed to provide him with benefit during the period from the time he was determined eligible for Special Education until his next IEP of June 1989.

Did the District provide Bernard with an appropriate education for the extended school year 1988-89?

Bernard was determined eligible for the extended school year program by the April 1989 IEP team. Bernard's IEP of June 1989 also indicated eligibility for an extended school year program of at least four weeks length. It is difficult to determine what placement, if any, the District offered for Bernard for the extended school year of 1988-89. The District originally had recommended placement at Coventry through the summer of 1989. (Exhibit 19) However, the District characterized Bernard's placement at Coventry as "diagnostic" and by its own admission, Coventry would not have continued to be an appropriate placement for Bernard;

nor did the District recommend the Coventry class as a possible placement site at the IEP meeting of June 1989.

The District is not relieved of its responsibility to offer an appropriate placement for Bernard based on its perception that Bernard's parents preferred to enroll him in a summer program located outside the District. Because the IEP team determined that Bernard was eligible for the extended school year program, the District was responsible for offering Bernard an appropriate placement for that period; it did not, however. In order for the District to prevail at this hearing, it must establish that it did in fact have an appropriate placement for Bernard.

Was the District's proposed placement at Carlton an appropriate placement for Bernard for the 1989-90 school year?[4]

At some point after Bernard began at Coventry, the District informed Mrs. [ ] that Bernard would not return to that same class in the fall. She subsequently visited both SH and CH classes at Carlton, after which a Program Specialist acting on behalf of the District indicated that the CH class was not approproate for Bernard. At the IEP of June 1989, the [ ]s asserted that Bernard required a more intensive behavior modification program, socialization activities, and speech and language therapy. Bernard's resulting IEP of June 1989 indicated "fall placement full-time in a Special Day Class; small group instruction; 60 minutes each week of small group speech and language services or consultation as appropriate." (Exhibit 32) It is questionable whether the IEP of June 1989 provided an adequate program description by which to determine an appropriate placement for Bernard. (Testimony of Mr. Wing)

Even though the [ ]s had not yet enrolled Bernard in the program at the Clinic at the time of the IEP, the District apparently did nothing further towards providing a placement for Bernard for the fall of 1989 until Mr. Smith initiated a series of phone conversations and correspondence with Mr. Chambers later in July. Even when Bernard began the Clinic program on June 26, 1989, it was not predetermined that he would remain there for more than the three month trial period for which he had been accepted. Mr. Pacheco testified that he did not follow up with placement of Bernard after the IEP meeting of June 1989 because he understood that the [ ]s were moving to Los Angeles. Mr. Chambers stated that the District could not implement Bernard's IEP of June 1989 because Bernard was not a resident of the District. (Exhibit 40)

At the request of the [ ]s, a new IEP was developed for Bernard in September of 1989. Bernard's parents did not object to the statement of Bernard's present levels of functioning nor to the goals and objectives contained in that IEP. Their disagreement centers around the description of the placement on the IEP. Based on the inability to reach an agreement with the District, and their belief that the District's proposed placement was inappropriate, the [ ]s chose not to implement the IEP and, instead, Bernard remained at the Clinic while his parents challenged the IEP by means of this hearing.

More than one month after the IEP meetings of September 1989, Mr. Chambers, by letter, offered placement for Bernard in the Communicatively Handicapped class at Carlton School, on the condition that Bernard return to the District.

The preschool class at Carlton, an integrated school campus, is between three and four hours daily. There are nine, three to five year old children with severe language disorders in the class. The teacher is a speech and language therapist trained in behavior intervention techniques. She is assisted by two instructional aides. The focus of the class is on the development of language and pre-academic skills. There are no other autistic or autistic-like children in the class. (Testimony of Ms. Serpa and Mr. Pacheco)

No evidence was presented to indicate the specific manner in which behavioral goals and objectives in Bernard's IEP of September 1989 would be implemented in the class, nor did Ms. Anton-Giovanni, the classroom teacher, appear as a witness.

Ms. Bowen felt that the CH class at Carlton met placement criteria on Bernard's IEP of September 1989. She previously believed, however, that the class was not appropriate for Bernard because he did not have the requisite attending skills. Mr. Pacheco felt that the Carlton class was appropriate because Bernard's needs were similar to the needs of other children in the class, although he indicated that there were no children with the designation of autistic in the class. Ms. Serpa testified that Bernard is developmentally similar to the children in the class.

While the Carlton class was highly praised by all, witnesses with extensive experience with young autistic children did not find the proposed placement appropriate for Bernard for the 1989-90 school year. Dr. Kirchner testified that while the Carlton class provided an excellent program for preschoolers, it was not appropriate for Bernard because he would be overstimulated by the classroom environment, his language skills were at a

lower level than those of the other students, and he lacked the requisite attention span to benefit from either small- or large-group activities. Although she did not have first-hand knowledge of the Carlton class, after reading the program description in Exhibit 75, Dr. Siegel indicated that Bernard would require more structure than provided by the class.

There was no evidence that Ms. Anton-Giovanni was trained to work with autistic children. The professionals most experienced with autistic children indicated that Bernard's behavioral and learning needs require that the person working with him be trained to work specifically with young autistic children.

The focus of the Carlton class is on language development, which undoubtedly is an important aspect of Bernard's educational needs. Ms. Anton-Giovanni is a qualified teacher and, as a speech and language therapist, could address Bernard's communication deficits. However, Bernard requires a more restrictive and less stimulating environment than that offered at Carlton. He requires full-time, one-to-one instruction and is unable to benefit from group instruction. Even if the language needs of the children in the Carlton class were similar to Bernard's, all of the witnesses recognized the need for Bernard to acquire attending skills prior to being able to benefit from language instruction. He has not yet attained these requisite skills.

The evidence establishes that Bernard must first learn appropriate behaviors, socialization, and communication skills in a one-to-one situation and then he must learn how to generalize these skills into other environments. Bernard had not in either September or in November of 1989, when this class was proposed by the District, developed the requisite skills to benefit

from placement in the class at Carlton. Therefore, based on all of the above, the Carlton class does not provide that combination of facilities, personnel, location, and equipment that will enable Bernard to benefit educationally as required in *Rowley*.

WAS THE CLINIC AN APPROPRIATE EDUCATIONAL PLACEMENT FOR BERNARD?

The [ ]s chose to place Bernard at the Clinic commencing in June of 1989. Because the District did not provide Bernard with an appropriate education at that time, the issue then becomes whether Bernard's placement at the Clinic was reasonably calculated to enable him to receive educational benefit, and, if so, are the [ ]s entitled to reimbursement for the costs associated with that placement.

Since September 12, 1989, the Clinic has been certified as a nonpublic agency to provide counseling under the license of Dr. Lovaas, Clinical Psychologist and Director of the Clinic. A nonpublic agency certified by the state may provide related services authorized in federal law and DIS authorized under California Special Education law.

The District asserts that Bernard's IEP cannot be implemented at the Clinic, because the Clinic is only certified to provide counseling, a related service, which must support Special Education. The District also asserts that if Bernard were school age, he would be required to attend school and could not receive only related services; but Bernard, of course, is not of compulsory school age.

Section 56441 of the California Education Code delineates the rationale for funding programs for individuals

with exceptional needs between the ages of three and five years. In part the mission of preschool education is to:

> a. Significantly reduce the potential impact of any handicapping conditions;
>
> b. Produce substantial gains in physical development, cognitive development, language and speech development, psychosocial development, and self-help skills development . . .
>
> f. Reduce the need for special class placement in special education programs once the children reach school age;
>
> g. Save substantial costs to society and our schools.

Section 56441.1(b) states "As the preschool child approaches the age to enter an elementary school environment, the child's preparation shall be geared toward a readiness for kindergarten and later school success." An EHA Policy Letter dated July 25, 1986, discusses related services for parents and states that related services may be provided to "assist the child in developing skills needed to benefit from Special Education or correct conditions which interfere with the child's progress towards goals and objectives. . . . The service could precede the initiation of specially designed instruction to make the child ready for instruction." (EHLR 211:399)

Preschool aged children are not required to participate in a structured educational program in a traditional classroom setting. California Education Code Section 56441.4 lists appropriate settings for preschool services and includes regular public or private preschool programs, the child's regular environment, a developmental center or family day care home, special sites, and the child's home. This section does not limit the location in which

the preschool-aged child may receive services to a traditional classroom setting or nonpublic school.

California Education Code Section 56441.8 indicates that early education services for preschoolers may be provided by, among others, a certified nonpublic agency. Title 5 California Administrative Code Section 3051(a)(1) states, "Designated instruction and services may be provided to individuals or to small groups in a specialized area of educational need, and throughout the full continuum of educational settings."[5]

Counseling as a DIS is addressed by three sections of the California Regulations implementing Special Education statutes: Section 3051.9 defines Counseling and Guidance Services; Psychological Services under 3051.10 includes "(a) Counseling provided to an individual with exceptional needs by a credentialed or licensed psychologist or other qualified personnel; (b) Consultative services to parents, pupils, teachers, and other school personnel; (c) Planning and implementing a program of psychological counseling for individuals with exceptional needs and parents;" Section 3051.11 authorizes Parent Counseling and Training which may include "(a) Assisting parents in understanding the special needs of their child, and (b) Providing parents with information about child development."

The services Bernard and his mother receive at the Clinic fall within the services identified as counseling in the above California regulations. The Clinic provides intensive behavior modification to teach Bernard compliance and attending skills. His program also stresses development of language, self-help, and socialization skills. The parent component of the program teaches Mrs. [ ] how to reinforce the skills Bernard learns at

the Clinic and trains her in behavioral management strategies.

Mr. Smith indicated that the Clinic met Bernard's goals from his IEP of June 1989, and is currently implementing the goals and objectives of Bernard's IEP of September 1989. The Clinic provides Bernard with an intensive one-to-one behavioral intervention program designed to reduce his most disabling symptoms. Mrs. [ ] is receiving parent training in these behavioral techniques used by the Clinic by a trained therapist under supervision of Dr. Lovaas. Bernard's sessions target acquisition of language, self-help skills, elimination of inappropriate behaviors, and socialization skills. Although not entire successful yet, Bernard's program also includes participation in a preschool program. The entire Clinic program is under the supervision of Dr. Lovaas and administered by trained therapists.

The District conceded that Bernard has made progress while participating in the Clinic's program. Witnesses testifying for both sides recognized behavioral changes and improved language skills in Bernard, and for the first time the District was able to assess Bernard using standardized testing instruments. Bernard's progress at the Clinic was noted by his appropriate use of language, use of full sentences, awareness of his environment, and beginnings of play and imitation of peers. Dr. Siegel noted academic gains, improved language pragmatics, increased compliance, and less difficulty in transitions. These achievements establish that Bernard has derived benefit from his placement at the Clinic.

Witnesses for the parents, Dr. Kirchner, Dr. Siegel, and Mr. Smith, as well as literature regarding autism, emphasize the importance of appropriate and early intervention to enhance the language, social and cog-

nitive development of a young autistic child such as Bernard. The District asserts that counseling must support Special Education. This standard is not applicable in the context of preschool Special Education. Based on the laws regarding Special Education services for children between the ages of three and five, Bernard as a preschooler is entitled to services designed to assist him to develop skills which will enable him to enter a program in the District.

The Clinic's program was designed to meet Bernard's individual needs for structure, intensity, and consistency unavailable in the 3.5 hour program offered by the District. The evidence establishes that the Clinic has both provided Bernard with benefit as required under *Rowley* and has assisted him to develop the requisite skills which will ultimately be essential to enable him to benefit from placement in a District program. The Clinic, therefore, has provided an appropriate placement for Bernard.

ARE THE [ ]S ENTITLED TO REIMBURSEMENT FOR EXPENSES WHICH THEY INCURRED IN EDUCATING BERNARD?

When an action is brought under Section 1415(e)(2) of the EHA, relief may be granted "as the courts determines appropriate." In *School Committee of the Town of Burlington v. Dept. of Educ.* (1985) 105 S.Ct. 2003, the United States Supreme Court determined that when a dispute arises and parents voluntarily place their child in a nonpublic setting during the pendency of due process proceeding, parents may be entitled to reimbursement for expenses which they incur in educating their handicapped child. In *Burlington* the Court found that parents could be reimbursed for their expenses of nonpublic

school placement for their child when the public school placement was inappropriate.

Following the Court's analysis in *Burlington,* the courts under certain circumstances (for example, where the parents have violated the "stay put" provision of the law) have balanced the equities in determining whether reimbursement for nonpublic school placement by a child's parents is appropriate. Assuming that the equities test applies in this case, the balance tips on the side of the parents.

While the District has not acted in bad faith, it has acted slowly and has attempted to relieve itself of the duty to educate Bernard by continuing to assert that Bernard does not reside within its jurisdictional boundaries. Bernard's IEPs have not included all of the parameters required to define an appropriate placement. The District did not provide Bernard with an appropriate placement at Coventry, nor did the District provide Bernard with the required related service of speech and language or an extended school year program.

Because of their concern for Bernard's failure to develop appropriate language, inappropriate behavior, and lack of social skills, coupled with the urgency of obtaining services to assist Bernard at a critical early developmental period as well as the inadequate services provided to Bernard by the District, the [ ]s took action. As a result, they enrolled Bernard in what they perceived as a program that would provide him with the help he needed with the hope that he would develop skills that would ultimately allow him to be educated by the District.

California Education Code Section 56441.1 states that services serving preschool children should be provided in

coordination with other agencies and should not duplicate these services. The code also recognizes nonpublic agencies as a source, among others, which may provide services to preschool-aged handicapped children pursuant to California Education Code Section 56366. Included therein is the requirement that the nonpublic school or institution has been certified as meeting those standards relating to the required special education services and facilities for individuals with exceptional needs. Recently the U.S. Court of Appeals, Second Circuit, reiterated its prior decision in *Antkowiak v. Ambach,* 838 F.2d 635 (2d Cir.) cert. denied, 109 S.Ct. 133 (1988), and concluded that "placement in an unapproved school, whether by school officials or through unilateral action by parents, cannot be considered 'proper under the act' because it would violate the Act's requirement that placements 'meet the standards of the State educational agency." (*Tucker v. Bay Shore Union Free School District,* EHLR Dec. 441:429) The Clinic was neither a certified nonpublic agency nor a certified nonpublic school when Bernard was enrolled there by his parents in June of 1989. Therefore, the Hearing Officer cannot order reimbursement for the expenses incurred by the [ ]s related to Bernard's placement at the Clinic for the period prior to the Clinic's certification on September 12, 1989, as a nonpublic agency.[6]

Reimbursement to the [ ]s for the cost of Bernard's participation in the Clinic's program was inappropriate prior to September 12, 1989, because the Clinic did not then meet state certification requirements. However, the District continued to deny its responsibility to educate Bernard and failed to make a timely and appropriate placement recommendation as a result of Bernard's IEP developed in September of 1989. Because the Clinic

has provided Bernard with educational benefit and has met the requirements for providing services to Bernard as a preschooler, the [ ]s' decision to maintain Bernard at the Clinic for the 1989-90 school year is compensable insomuch as the Clinic has been determined appropriate to meeting Bernard's need, is a placement from which he is benefiting, and has met state certification requirements since September 12, 1989.

The Hearing Officer determines that the appropriate relief in this case is to reimburse the [ ]s for certain costs related to Bernard's participation in the Clinic program after its certification effective on September 12, 1989.

Are the [ ]s Entitled to Reimbursement for Transportation Costs?

The [ ]s have requested that daily transportation between the apartment rented by Mrs. [ ] and the Clinic at UCLA be provided by the District as a required related service. The [ ]s have also requested retroactive and prospective reimbursement for the cost of air fare for Bernard and Mrs. [ ] to travel two times each month between their home in San Jose and Los Angeles, where the Clinic is located.

Related services are defined in 34 CFR 300.13(b)(13) as "transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education." Transportation clearly falls under this definition. The Supreme Court in *Irving Independent School District v. Tatro,* 104 S.Ct. 3371 (1984), determined that a school district is obligated to provide related services to the Special Education student when the service is necessary to aid the child to benefit from Special Education.

Included in the [ ]'s request for transportation costs is the request for reimbursement for transportation-related costs incurred by Mrs. [ ]. As determined above, Bernard's program requires parent participation, which in this case is his provided by his mother. Since his mother must be at the Clinic with Bernard in order to participate and receive parent training there, her transportation logically also falls under what is defined as a required related service. Since Bernard is only four years old and autistic, an escort, namely one of his parents, is necessary to accompany him whenever he travels.

A Policy Letter dated August 15, 1980, from the OSE addresses the issue of providing transportation costs for an escort and stated "[W]here: (1) the public agency requires that an adult (staff member or parent) must travel with the child to a residential placement; (2) transportation is considered a 'related service' under Part B of the Education of the Handicapped Act." The letter goes on to place responsibility on the District to reimburse the parent for "[R]easonable transportation expenses . . . such as plane fare, rental car, meals and lodging." EHLR 211:218 An additional OSE Policy Letter dated September 12, 1988, EHLR 213:164, also states that "when it is necessary for the safety of the child for an adult to accompany the student, round-trip transportation for the adult must be provided."

Transportation with a parent escort is required for Bernard and falls under the definition of a "related service," according to the OSE guidelines discussed above.

In order for Bernard to attend the program at the Clinic on a daily basis, it is necessary that he be transported there. Since during the week he is at an apartment in Thousand Oaks, located approximately 20 minutes from the Clinic, the District is responsible under

the federal regulations to provide him with transportation to and from the apartment to the Clinic for each day he participates in the program there. Since the District does not itself provide transportation in the City of Los Angeles, it is authorized to reimburse the [ ]s for the costs they incur in relation to Bernard's daily transportation.

The Clinic is located in Los Angeles, some distance from the [ ]'s home in San Jose. Federal regulations enacted pursuant to the EHA clearly indicate that the right to a *free* education may include placement at a nonpublic residential program.[7] "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child the program, including non-medical care and room and board, must be at *no cost to the parents* of the child." 34 CFR Section 300.302 (emphasis added)

When asked to determine the responsibility of a school district to provide transportation of a handicapped child to an out-of-district site, the Fifth Circuit Court in *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153 (5th Cir. 1986) concluded, "Unless the transportation request is shown to be unreasonable, the Act requires that such transportation be provided as a related service." 790 F.2d at 1160. In a Policy Letter dated September 12, 1988, the federal Office of Special Education (OSE) interpreted Section 300.302 "[T]o require at a minimum that a child placed in a residential school must be provided transportation to and from the facility at the beginning and end of the school term and when the school is officially closed to students." EHLR 213:164.

Title 5 California Code of Regulations Section 3066-(g)(4) is consistent with this interpretation and states that

> Individuals placed in residential nonpublic schools by a public education agency shall, if specified in the individualized education program, be transported to and from the facility at no cost to the parents. Additional trips for individuals with exceptional needs, if required during the period of the contract, shall also be specified in the individualized education program. Reimbursement shall be made at the rate of the least expensive air, train, or bus fare.

Transportation at the commencement and end of the school term, and at times when the school is officially closed to students, falls under the definition of a related service under the EHA. The California regulation does not specifically address transportation for those periods when school is officially closed to students. However, the federal definition is controlling, unless the California regulation is broader, which it is not here. Relying on OSE guidance found in their policy letters discussed above for interpretation of Section 300.302, transportation to which handicapped students in residential placements are entitled also includes those periods when school is officially closed to students.

In order to participate in the program, Bernard must travel some distance and at a significant cost to his family. To comport with its responsibility to educate Bernard at no cost to his parents, under the EHA, OSE guidelines, and state regulations, the District must provide transportation for Bernard to travel between his home and the Clinic at the beginning and end of each term, and at those times when school is officially closed.

In this case, "when school is officially closed" is interpreted to include Thanksgiving, winter spring and summer breaks.

There was no persuasive evidence to establish that twice-monthly trips to the [ ]'s home in San Jose are a required part of Bernard's educational program. Therefore, the [ ]'s request in regards to the twice monthly trips is denied.

Title 5 CCR 3066(g)(4) indicates that transportation can be provided *if* specified in the IEP. The Hearing Officer concludes that Bernard's IEP should be amended to include transportation as a required related service for Bernard in the company of his mother, between the [ ]'s home in San Jose and the Clinic in Los Angeles at the beginning and end of the Bernard's participation in the program, at Thanksgiving, winter, spring, and summer breaks; and between the Clinic and Bernard's residence in the Los Angeles area for each day he attends the Clinic.

Are the [ ]s Entitled to Reimbursement for Lodging and Associated Costs?

The [ ]s have requested reimbursement for lodging and associated costs which they assert they are entitled to in lieu of daily transportation from their home in San Jose to the Clinic in Los Angeles. As discussed above, to participate in the Clinic's program, Bernard must travel a distance that cannot practically be done on a daily basis. The Clinic is a day program and does not provide a residential facility. Bernard's mother must also participate in the program, as discussed above. Parent training is a required component of Bernard's program. It therefore is necessary for both Bernard and his mother to temporarily reside within close proximity of the Clinic.

Lodging for Bernard and his mother is required and is allowable in lieu of transportation under California Education Code Section 41850(b)(3), which states that "transportation" includes "providing board and lodging to pupils by a school district or county superintendent of schools made in lieu of providing for the transportation of pupils between their homes and the regular full-time day schools they attend." Although this section does not include lodging costs for other than the pupil, in this case Mr. [ ]'s participation is an integral part of Bernard's program.

In order to be provided with a free appropriate public education, the expenses associated with lodging for Bernard and his mother must be at no cost to them. The District therefore is responsible for the $895 per monthly rental and utilities (gas, electricity, and water) of their Thousand Oaks apartment for the same time period as described above.[8]

ARE BERNARD'S PARENTS ENTITLED TO REIMBURSEMENT FOR THE ASSESSMENT CONDUCTED BY DRS. SIEGEL AND ELLIOTT?

The [ ]s based their assertion that the District must reimburse them for the cost of the Siegel assessment on their perception that the District referred them to Dr. Siegel, intended the evaluation to be a part of its assessment, and relied on the assessment to formulate long-range educational plans for Bernard. The District asserts that it did not refer the [ ]s to Dr. Siegel, did not at any time communicate with Dr. Siegel, and did not receive a copy of the assessment.

It is unclear whether someone from the District made other than a casual referral of Drs. Siegel and Elliott to the [ ]s for an assessment of Bernard. The [ ]s received

Dr. Siegel's name and phone number from the District and the District recognized Drs. Siegel and Elliott as experts in the diagnosis of autism. On more than one occasion, the District acknowledged the importance of an assessment from Dr. Siegel in order to address Bernard's educational needs; both Ms. Milligan and Ms. Serpa believed that the assessment would provide valuable information regarding Bernard. The importance of the anticipated assessment was noted by both in Exhibits 16 and 19.

Under Federal Regulation 34 C.F.R. Section 300.-503(b) and California Education Code Section 56329(b), parents have the right to obtain an independent educational evaluation of their child at public expenses if they disagree with the assessment conducted by the District unless the District initiates a hearing under 34 C.F.R. Section 300.506 to show that its evaluation was appropriate.[9] In order for the District's assessment to be appropriate, it must fulfill the requirements of 34 C.F.R. Section 104.35(d), which states that the assessment must draw information from a variety of sources, use validated test instruments designed to assess specific areas of educational need, and be administered by trained personnel.

The [ ]s did not specifically disagree with the District's assessment of Bernard; however, they pointed out the sparsity of the information gathered through the District's attempts to an assessment of Bernard, and also asserted that the assessment was not comprehensive in that it did not assess Bernard's suspected disability – autism. The fact that the [ ]s then went to Dr. Siegel for an assessment is an indication of their dissatisfaction with the District's assessment, thereby satisfying the requirement that there be "disagreement" with the District's assessment.

The District is required to assess Bernard in all areas related to his suspected disability. (California Education Code Sections 56320(f) and 56302) Mr. and Mrs. [ ] referred Bernard to the District in February of 1989, based on their concerns regarding his failure to develop speech and language appropriately, inappropriate behavior, and delayed social development. Also in February of 1989, Dr. Hawes recommended psychometric, speech, and behavioral evaluations. (Exhibit 7)

The Assessment Plan drawn up by the District indicated that assessment would occur in the areas of social/adaptive behavior, psycho-motor development, communication, intellectual development, hearing and vision. (Exhibit 10) A hearing evaluation was conducted (Exhibit 14); a health history was obtained from the [ ]s (Exhibit 12); speech and language assessments were based on observations of Bernard on two occasions, attempts at standardized assessments, and information from his parents (Exhibit 15); the psychological assessment consisted of an observation of Bernard at Explorer preschool, an interview of the [ ]s using the Alpern-Boll Developmental Profile II, and two testing sessions which included attempts at administering the Merrill-Palmer Scale of Mental Tests. (Exhibit 16) Mr. Pacheco and Ms. Bowen attempted to assess Bernard on two occasions in the area of speech and language. Ms. Serpa twice attempted to administer standardized testing instruments to Bernard. Reports based on these attempts to assess Bernard note difficulty in getting Bernard to comply and pay attention and both reports noted autistic-like behavior.

Attempts by the District to assess Bernard in March and April of 1989 resulted in sparse data. Apparently due to their limited understanding of Bernard, they

placed him in a class for the visually impaired for "diagnostic" purposes. The District suspected that Bernard was autistic and was obligated to conduct an assessment that would identify his specific needs. Given the District's responsibility to assess Bernard in all areas of his suspected disability, the sparsity of the information obtained as a result of assessment by the District, and the reliance by the District upon the anticipated assessment by Drs. Siegel and Elliott to develop plans for Bernard's education, the District's assessment was not adequate. The District is responsible for the cost of the assessment made by Drs. Siegel and Elliott[10]

ARE THE [ ]S ENTITLED TO ATTORNEY FEES AND EXPERT WITNESS COSTS INCURRED IN RELATION TO THIS HEARING?

The [ ]s have requested reimbursement for legal costs associated with this fair hearing. Twenty U.S.C. Section 1414(e)(4) addresses the authority of a United States District Court to "award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child who is the prevailing party" in actions which are brought before it. This section refers to actions brought before a *District Court* and does not indicate that the Hearing Officer has authority to award legal costs in administrative hearings such as the present one. *Mathern v. Campbell County Children's Center* (D.Wyo. 1987) 1987-88 EHLR DEC. 559:274. (See also *McSombodies v. Burlingame Elementary School District* (9th Cir. 1989) 1988-89 EHLR DEC. 441:595)

ORDER

1. Bernard's placement at the Clinic for Behavioral Treatment of Autistic Children for the 1989-90 school year including the extended school year is appropriate.

2. Within ten days of receipt of this order, Bernard's IEP dated September 21 and 29, 1989, shall be amended to include the following:

a. A 40-hour-per-week educational program;

b. a full-time, one-to-one individual extensively trained in behavioral intervention techniques;

c. parent training for five hours per week, of which at least 50 percent shall take place in Bernard's home;

d. transportation for Bernard and his mother between their home in San Jose and Los Angeles at the beginning and end of the Bernard's participation in the program, at Thanksgiving, winter, spring, and summer breaks; and between the Clinic and Bernard's residence in the Los Angeles area for each day he attends the Clinic.

3. Within ten days of receipt of this order, Bernard's IEP dated September 21 and 29, 1989, shall be extended through August 31, 1990.

4. Within 30 days of receipt of this order, the District shall reimburse the [ ]s for the costs associated with Bernard's placement at the Clinic for the 1989-90 school year, commencing with September 12, 1989, and continuing through the extended school year or until such time as the Clinic ceases to be certified as a nonpublic agency. Reimbursement shall include the following:

a. tuition in the amount of $4,000 per month less $467.84 paid by the Regional Center for parent training;

b. transportation costs, subject to proof, incurred by Mrs. [ ] and Bernard for trips between the [ ]'s home in San Jose and Los Angeles at the beginning and end of the Bernard's participation in the program, at Thanksgiving, winter, and spring breaks.

c. transportation between the Clinic and Bernard's residence in the Los Angeles area for each day he attends the Clinic, subject to proof;

d. costs associated with lodging for Bernard and his mother, including rent at $895 per month and utilities (gas, electricity, and water) subject to proof.

5. Within 30 days of receipt of this order the District shall reimburse the [ ]s in the amount of $650 for the cost of the evaluation made by Dr. Bryna Siegel on April 26, 1989.

Mary L. Cote, Hearing Officer
California Special Education Hearing Officer

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[1]The Hearing Officer has jurisdiction to adjudicate issues that are not directly matters of Special Education law but which must be resolved before making a determination regarding issues of identification, assessment, educational placement and the provision of a free appropriate public education. California Education Code Section 54501. In this case, the issue of whether the District has provided or is required to provide an appropriate education for Bernard could not be addressed without first making a determination regarding the [ ]'s residency.

[2]The fact that the [ ]s disagreed with the placement proposed by the District and chose to enroll Bernard in a program located outside of the District does not dictate that their residency has changed for purposes of assigning responsibility for Bernard's education. To interpret otherwise would indicate that any time a Special Education student is placed in a residential setting by either a school district, parent, or as a result of a due process hearing or court order, the child would be forced to give up his/her residency.

[3]Relying on 5 C.C.R. Section 3001(b) which states that "Such an educational program shall provide the equal opportunity for each individual with exceptional needs to achieve his or her full potential, commensurate with the opportunity provided to other pupils," the Attorney for the [ ]s asserts that California requires a higher standard when determining what is appropriate public education. Although the language of the California regulation appears to set a higher standard of appropriateness, the Hearing Officer defers to a recent decision of the United States District Court for the Northern District of California in *Bertolucci v. San Carlos Elementary School District*, 1989) 721 F. Supp. 1147, in which the Court concluded that the *Rowley* "benefit" standard of appropriateness applies in California.

[4]Although McKinnon was mentioned as a possible placement for Bernard in the Fall of 1989, there was insufficient evidence to make a determination of its appropriateness.

[5]Education Policy Statement SE-12, entitled "IEP Implementation; Related Services and DIS" issued by the California State Department of Education, Office of Special Education reiterates this policy and states, "pupils who are determined eligible for Designated Instructional Services in accordance with state law and regulations, must receive such services whether or not they participate in another special education program option."

[6]The attorney for the [ ]s asserts that the District could have obtained a waiver of the certification requirement for the Clinic when Bernard was first enrolled there. However, the District did not request a waiver and there are no assurances that a waiver would have been granted upon application.

[7]Although the Clinic is not defined as a "residential" facility, it nonetheless is comparable and for purposes of this hearing shall be considered "residential."

[8]Bernard's infant sister accompanies Bernard and his mother to Los Angeles. These costs are not affected by her presence.

[9]Although this hearing was not initiated by the District, the issue of reimbursement for the assessment of Bernard conducted by Drs. Siegel and Elliott was identified during mediation as an issue for resolution at the hearing.

[10] Alternatively, the right to reimbursement, for Dr. Siegel's assessment may be analogized to *Burlington* which stands for the proposition that parents may be reimbursed for expenses they incur in taking action in order to obtain an appropriate education for their handicapped child.

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No. 94-492

In The

Supreme Court of the United States

October Term, 1994

UNION SCHOOL DISTRICT, CALIFORNIA DEPARTMENT OF EDUCATION, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

BERNARD SMITH, by and through his parents, JOHN and DONNA SMITH (UNDER SEAL),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I

INTRODUCTION

Respondents' claim that petitioners seek a factual review is disingenuous. Even if every additional fact included in respondents' opposition had been confirmed by the District Court or Ninth Circuit, the issue remains: Does the Individuals With Disabilities Education Act (IDEA), at 20 U.S.C. § 1400 *et seq.*, authorize the extraordinary remedy provided, *to wit,* establishing a second dwelling for the family of a disabled pupil at public expense?

This legal question is of serious consequence to all of the states, not just California. If respondent Bernard Smith, his mother and sister were entitled to move to Los Angeles at public expense, then would a family in a similar situation be entitled to move to the midwest or even Japan at public expense? What if not only the mother, but the father and siblings were determined to be necessary to the implementation of the pupil's IEP. Would they, too, be able to move about the country with the pupil at public expense?

These are not frivolous questions. In fact, these very questions were asked of the respondents by the panel of the Ninth Circuit and respondent's counsel answered in the affirmative without hesitation, even offering the example of the school as far away as Japan!

Petitioners believe that the decisions below seriously distort the IDEA and previous Supreme Court decisions, reaching far beyond what was intended in the entitlement to a "free, appropriate public education".

II

ARGUMENT

THIS CASE INVOLVES IMPORTANT QUESTIONS OF LAW THAT SHOULD BE SETTLED BY THIS COURT

A. The Petition Does Not Request Review of Factual Issues.

Ignoring that these petitioners have adopted the statement of facts of the District Court, respondents attempt to characterize this case as one of facts rather than law. However, no one disputes that the pupil, Bernard Smith, benefited from the unilateral placement in the program in Los Angeles. For purpose of decision on the law, the petitioners would concede that the programs offered by the school district did not include a 40-hour-per-week educational program, a full time behavioral aide, or parent training in the home, as subsequently found appropriate and ordered by the hearing officer.

However, the important issues are: Did the hearing officer, the district court and the Ninth Circuit have the *authority under the IDEA to order the district to pay for a family apartment* when the parents unilaterally chose a private day program for Bernard beyond a reasonable commute distance from their residence in San Jose without following the IDEA procedures? Even assuming that all the facts as stated by respondents in their opposition are true, these questions remain, and they are clearly legal questions.

B. These Important Legal Questions Need Resolution By This Court.

The lower courts' decisions distort the requirements of the IDEA and make mockery of the carefully crafted procedures that Congress established in the IDEA for resolving substantive and compliance disputes.

Petitioners have demonstrated persuasively in their petition that parent apartments are *not* authorized by the related services provision of the IDEA, 20 U.S.C. § 1401(a)(17), as found by the lower courts. The only reference to residence,

lodging, dwellings, room and board (or whatever term one prefers) is the inclusion of *residential schools* as part of the entitlement to a free, appropriate public education.

Yet the courts below, without reference to the above arguments, summarily concluded that parent apartments are related services. There is no authority for such a holding.

Likewise, the lower courts *completely ignored* the state petitioner's argument that parents, while entitled to seek private placements, must at least pursue their procedural remedies against a school district.

The respondents argue that the hearing officer found that the district did not offer an appropriate IEP in June or September of 1989. Even assuming the truth of the hearing officer's findings (which were made a year later, in June of 1990) does not cover up the fact that the Smiths did not contest the district's offer in June of 1989, and without notice to the district the Smiths unilaterally located the private placement in Los Angeles, enrolled Bernard there, rented an apartment, and then demanded payment. Seven months later they requested a hearing under 20 U.S.C. § 1415.

The respondents complain that the school district refused to recognize Bernard's residency after he was relocated to Los Angeles.[1] Is this not the situation that the Court envisioned in *Honig v. Doe*, 408 U.S. 305 (1988) when it declared that the State educational agency, under 20 U.S.C. § 1414(d), must provide direct services to pupils when a district is unable or unwilling? Yet how is the State educational agency to know of the failure of a district to comply with the law if parents, like the Smith's, have no obligation to utilize state complaint procedures that are developed to resolve such compliance issues?

These are not factual disputes. They are legal questions of importance to every district in this nation that is grappling

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[1] Here it is important to recognize that while the district did argue that the pupil was not a resident for purposes of their refusal to pay for the Los Angeles private program and apartment, the district continued to conduct IEP meetings to offer a program locally.

with unilateral private placements by parents of disabled pupils. They are legal questions that this Court has not addressed.

C. No Prior Decision By This Court Is Dispositive.

Respondents rely heavily on three prior decisions of this Court. Yet none address the issues here.

In *Board of Educ., Etc. v. Rowley,* 458 U.S. 176 (1982) this Court clarified that the IDEA is designed to confer some educational benefit upon disabled pupils. This case, however, does not involve what is appropriate for a pupil. Rather, it asks, did Congress anticipate public payment for parent apartments under any circumstance?

In *Burlington School Committee v. Department of Educ.,* 471 U.S. 359 (1985) this Court concluded that parents cannot be denied reimbursement as equitable relief for unilateral private placements when parents "violate" the stay-put provisions of the IDEA (20 U.S.C. § 1415(e)(3)) when a district has failed to provide an appropriate program for the pupil. And in *Florence Co. Sch. Dist. Four v. Carter,* 141 S.Ct. 361 (1993) this Court found that parents could also be reimbursed for unilateral private placements under the conditions established in *Burlington,* even if the private school did not meet state certification standards, if, in fact, the pupil received appropriate education there.

Neither of these cases address the legal issues raised herein regarding reimbursement for family dwellings. *Burlington* and *Carter* were firmly grounded in the plain language of the IDEA that authorizes and requires private school placements, including residential schools, when no appropriate public educational program is available.

Neither of these cases controls parents who simply disregard the established IDEA procedures. It is one thing for this Court to hold, as it did in *Burlington,* that parents can "violate" the stay-put requirement, a requirement that only comes into play *after a parent has exercised their right to a hearing under 20 U.S.C. § 1415.* It is quite a different situation for the district court and Ninth Circuit to state, as they did here, that

a parent can be reimbursed for a unilateral placement when they eschew the very procedures that Congress established for them under the IDEA.

CONCLUSION

This Court has never addressed the important legal issues raised in this petition. Neither the district court nor the Ninth Circuit determined, as this Court did in *Burlington* and *Carter*, that the respondents were entitled to reimbursement as equitable relief. Instead, both lower courts found that *reimbursement for parent apartments was an entitlement* – a related service under the IDEA. This is an extraordinary holding that has far reaching consequences.

Neither lower court *even acknowledged* the state petitioners' arguments that parents are not free to claim a right to reimbursement for unilateral placements unless they themselves have made such a placement within the context of the detailed procedures carefully drafted by Congress in the IDEA.

Petitioners pray that this Court recognize the significance of these legal issues and accept the petition for review.

Respectfully submitted,

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